TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 108.

SIMON ROTHSCHILD AND FRANK ROTHSCHILD, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF S. ROTHSCHILD & BRO., PLAINTIFFS IN ERROR,

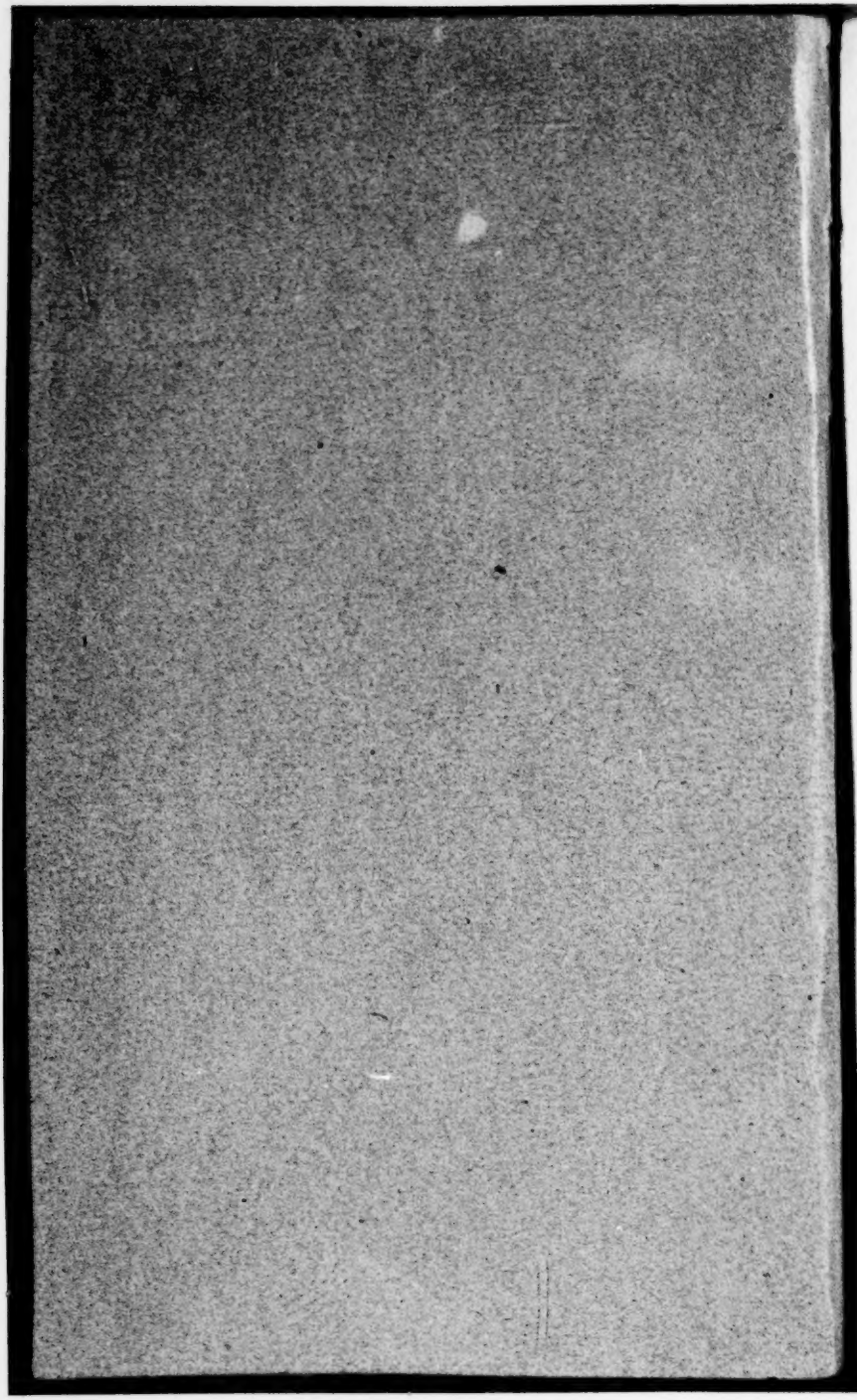
vs.

ROBERT A. KNIGHT, ASSIGNEE IN INSOLVENCY OF JAMES McKEON.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

FILED JULY 16, 1900.

(17,835.)



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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 3, 1901.

a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Springfield, within and for the county of Hampden, Greeting:

[Seal of the Circuit Court, Massachusetts.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court, before you or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Simon Rothschild and Frank Rothschild, both of the city, county, State, and district of New York, copartners, doing business under the firm name and style of S. Rothschild & Bro. and having their usual place of bus- in said city of New York, defendants, and Robert A. Knight, of Springfield, in the county of Hampden and Commonwealth of Massachusetts, as he is assignee in insolvency of the estate of James McKeon, of said Springfield, plaintiff, in a plea of contract or tort, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Simon Rothschild and Frank Rothschild, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 25th day of July next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, the twenty-sixth day of June, in the year of our Lord one thousand nine hundred.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
ALBERT MASON,
Chief Justice Superior Court of Massachusetts.

COMMONWEALTH OF MASSACHUSETTS, *Hampden,* } *ss:*

And now here the judges of the superior court make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

Seal of the Superior Court.

In testimony whereof I, Robert O. Morris, clerk of said superior court within and for said county, have hereto set my hand and the seal of said court this 28th day of June, A. D. 1900.

ROBERT O. MORRIS, *Clerk.*

[Endorsed:] Left in clerk's office for adverse party. —— ——, clerk.

b COMMONWEALTH OF MASSACHUSETTS, *Hampden,* } *ss:*

To all persons to whom these presents will come, Greeting:

Know ye that among our records of our superior court, sitting at Springfield, in said county of Hampden, for hearing of cases at law, from the first day of January, in the year of our Lord one thousand eight hundred and ninety-six, to the twenty-eighth day of June, in the year of our Lord one thousand nine hundred, both days inclusive, it is thus contained, the following being the entire record in the case:

1 COMMONWEALTH OF MASSACHUSETTS, *Hampden,* } *ss:*

Supreme Judicial Court.

SIMON ROTHSCHILD ET AL.
vs.
ROBERT A. KNIGHT, Assignee.

Report.

This is a writ of error. Copies of the assignment of error and of the plea are annexed and made a part hereof. The 14th assignment of error was abandoned at the argument before the court. Either

party may refer to the other pleadings and to the transcript of the record of the case under review which was produced at the hearing before me.

The plaintiffs in error moved that the defendant be required to elect between so much of his plea as set up *in nullo est erratum* and so much as traversed the issues of fact. I declined to grant the motion. If on matter of law the motion should have been granted, but in any aspect of the case the error was not prejudicial to the plaintiffs in error, then they are to take nothing by the motion. Otherwise the report is to be discharged and the case is to stand for hearing anew.

Subject to their competency and materiality, I found the following facts: The defendant in error is the assignee in insolvency of one James McKeon. The plaintiffs in error are parties doing business in and residing in the city and State of New York. Before the insolvency of McKeon, he had bought goods of the plaintiffs in error, and the action which the plaintiffs in error seek to review in their proceedings was brought against them by the defendant in error to recover for an alleged fraudulent preference.

The defendant in error had a verdict. The action was brought by trustee process. The writ was returnable to the superior
2 court in Hampden county, where two of the alleged trustees and the defendant in error lived, and goods, effects and credits of the plaintiffs in error in the hands of these trustees and in the hands of alleged trustees living in other counties, were attached.

There was no personal service on either of the plaintiffs in error. The writ was duly entered on the first Monday in May, 1896, and a declaration for goods sold and delivered by McKeon to the plaintiffs in error was duly filed. On July 8th, 1896, but not at a sitting established by the statutes, the plaintiffs' counsel suggested to Mr. Justice Maynard that the plaintiffs in error (these defendants) were not inhabitants of the Commonwealth, and notice was ordered to be given to them by publication, and that the action be continued until such notice was given. This notice was returnable on the first Monday of September, 1896, and was duly given as ordered, but no return that it had been given was made till July 6, 1899, when an affidavit that it had been given as ordered was filed by the defendant in error (the plaintiff in that case). On the 16 September, 1896, the plaintiffs in error (defendants in that case) appeared generally by their attorney, Chas. C. Spellman, Esq., thereto duly authorized, and on October 12th following, the attorney of the defendant in error (then plaintiff), made a motion to amend his declaration, which was consented to by the counsel for the plaintiffs in error, and was allowed, and the plaintiffs in error filed an answer denying each and every allegation contained in the original and amended declaration. Subsequently on June 21, 1897, the defendant in error (the plaintiff in that case) made another motion to amend his declaration, which was consented to by E. N. Hill, Esq., as counsel for the plaintiffs in error (then defendants), and was duly allowed. I find that Mr. Hill had been retained generally by the plaintiffs in error, though his written appearance was not entered till June 26th,

and that by virtue of his general authority he could consent to the allowance of such amendments. He conducted the trial for the plaintiffs in error without any assistance from other counsel, and filed a motion to set aside the verdict which was argued by Mr. Spellman. This motion was overruled, as were also the exceptions that were alleged.

Certain of the trustees who answered disclosing goods, effects and credits in their hands were charged, one was discharged, and others were not served with process. The order charging the trustees was not entered by special order of the court upon motion by the defendant in error and after notice to the parties, but was entered by the clerk under a general order and pursuant to the established practice. The course of business between the plaintiffs in error and their customers as regarded payments by the latter for goods purchased was for them to remit to the plaintiffs in error in New York by check, whether on local or New York banks did not clearly appear.

3 Judgment was duly entered for the defendant in error, and execution duly issued. In taxing the costs, witness fees were included. The certificate of the witnesses purported to be signed in two cases by the witnesses by the defendant in error. It appeared, and I find that in each case the witness asked the defendant in error to sign the certificate for him, and he did so, adding "by R. A. K."

No objection was made to the taxation by the plaintiffs in error prior to the issuing of the execution or appeal taken from it. It did not appear that they had notice of the taxation before the issuing of the execution.

Rules X, XII, XXVII and LIV, and the special rules of the superior court for Hampden county, printed August 31, 1896, may be referred to. It seemed to me that the petition should be dismissed. But counsel for the petitioners suggesting a doubt as to my authority to dispose of the case, in view of the peculiar nature of the proceedings, I report the case to the full court, such disposition to be made of it — shall seem meet.

JAMES M. MORTON, *J. S. J. C.*

December 14, 1899.

Rules.

X.

If either party shall change his attorney, pending the suit, the name of the new attorney shall be substituted on the docket for that of the former attorney, and notice thereof given to the adverse party; and until such notice of the change of an attorney, all notices given to or by the attorney first appointed shall be considered in all respects as notice to or from his client; except in cases in which by law the notice is required to be given to the party personally; provided, however, that nothing in these rules shall be construed to prevent either party in a suit from appearing for himself in the manner provided by law; and in such case the party so appearing shall be subject to the same rules that are or may be provided for attorneys in like cases, so far as the same are applicable.

XII.

No amendment in matter of substance shall be allowed after the entry of an action, unless by consent, in any case where the adverse party appears, except upon payment of a term fee; and upon striking out unnecessary counts or statements, or filing amendments after demurrer, the same terms shall be imposed; and no such amendment shall be allowed, unless by consent, after an action is placed on the trial list, except upon payment of a double term fee; but this rule shall not prevent the imposition, in any case, of such
4 further terms as the circumstances of the case and justice to the parties may require. When either party shall amend, the other party, if by reason thereof his case shall require it, shall be entitled also to amend without terms.

All motions for leave to amend shall be in writing, and shall contain or be accompanied with the proposed amendment.

XXVII.

On the first Monday of every month judgment may be entered, in all actions ripe for judgment, under a general order of the court; and the court, or any justice, may at other times order judgment to be entered in any action.

When actions shall be brought against parties severally liable upon written contracts, and some of the defendants shall be defaulted and others appear, the clerk may enter up judgment and issue execution against the parties defaulted, as if they had been the sole defendants; and the case shall go forward against the parties appearing, as in other contested cases.

LIV.

Motions may be heard by a judge in open court, or at chambers, as he shall appoint.

HAMPDEN, *ss:*

Superior Court.

AUGUST 31, 1896.

Orders Relating to Civil Sessions in the County of Hampden.

Ordered, that the following orders shall be in force and obtain in the superior court in the county of Hampden, from and after this date, until modified or abrogated by the court, viz:

I.

Separate sessions for court work and for work with juries will be held as follows: For court work, on the fourth Mondays of September and March, the second Monday of January and the first Monday of May; for work with juries, on the fourth Monday of October, the first Monday of January, and the second Mondays of March and June.

5 *Writ of Error.*

COMMONWEALTH OF MASSACHUSETTS, *Hampden*, } *ss.:*

[L. S.] To our trusty and well-beloved Albert Mason, chief justice of our superior court, Greeting:

Because in the record and proceedings, and also in the rendition of judgment, between Robert A. Knight of Springfield, in our said county of Hampden, in his capacity as assignee in insolvency of the estate of James McKeon, of said Springfield, plaintiff, and Simon Rothschild and Frank Rothschild, copartners, doing business under the firm name and style of S. Rothschild and Brotner, both of the city, county and State of New York, defendants, and John M. Smith and Peter Murray, both of Springfield, aforesaid, copartners, doing business at said Springfield under the firm name and style of Smith & Murray; James A. Houston and Alexander Henderson, copartners, doing business under the firm name and style of Houston & Henderson, in Boston, in our county of Suffolk; George A. Plummer, doing business in Boston, aforesaid, under name and style of George A. Plummer & Company; Barnard, Sumner & Putnam Company, a corporation duly established by law and having its usual place of business in Worcester, in our county of Worcester; N. S. Liscomb and A. G. Liscomb, both of Worcester, aforesaid, copartners, doing business under firm name and style of N. S. Liscomb & Son, trustees, in an action that was in our superior court, holden at said Springfield, within and for our said county of Hampden, on the first Monday of March now last past, to wit, on the sixth day of March, 1899, manifest error hath happened, as it is said, to the great damage of the said Simon Rothschild and Frank Rothschild, as by their complaint we are informed—

We, willing that the error, if any hath been, should be duly amended, and full and speedy justice done therein, to the said parties, do command you, that if judgment be therein rendered, you distinctly and openly send us the record and process of the suit aforesaid, with all things touching them, under your seal, together with this writ, so that we may have them before our justices of our supreme judicial court, to be holden at Springfield, within and for our county of Hampden, on the first Monday of July next, that inspecting the record and process aforesaid, we may for correcting that error therein, further cause to be done what of right and according to law shall be done.

Witness, Wallbridge Abner Field, Esquire, at Springfield, the twenty-fifth day of April, A. D. 1899.

ROBERT O. MORRIS, *Clerk.*

6 SUFFOLK, *ss.:*

Pursuant to the precept of this writ to me directed, I herewith send the record and process of the suit and process within men-

tioned, with all things touching the same, all of which are hereunto annexed, to the honorable the justices of the supreme judicial court.

[L. S.] In testimony whereof I have hereunto set my hand and seal this ninth day of May, A. D. 1899.

ALBERT MASON,
Chief Justice of the Superior Court.

Scire Facias.

COMMONWEALTH OF MASSACHUSETTS, *Hampden,* } *ss:*

[L. S.] To the sheriff of our county of Hampden, or either of his deputies, Greeting:

Whereas, at the complaint of Simon Rothschild and Frank Rothschild, copartners doing busines- under the firm name and style of S. Rothschild and Brother, both of the city, county and State of New York, a certain action prosecuted at the superior court, holden at Springfield, within and for the county of Hampden, on the 6th day of March last past, by Robert A. Knight, of Springfield, in our said county of Hampden, in his capacity as assignee in insolvency of the estate of James McKeon, of said Springfield, against the said Simon Rothschild and Frank Rothschild, defendants, and John M. Smith and Peter Murray, both of said Springfield, copartners doing business at said Springfield under the firm name and style of Smith & Murray; James A. Houston and Alexander Henderson, copartners, doing business under the firm name and style of Houston & Henderson, in Boston, in our county of Suffolk; George A. Plummer, doing business in Boston, aforesaid, under name and style of George A. Plummer & Company; Barnard, Sumner & Putnam Company, a corporation duly established by law and having its usual place of business in Worcester, in our county of Worcester; N. S. Liscomb and A. G. Liscomb, both of Worcester, aforesaid, copartners, doing business under firm name and style of N. S. Liscomb & Son, trustees, together with the proceedings and judgment therein, by our writ of errors was ordered to be removed into our supreme judicial court, next to be holden at said Springfield, on the first Monday of July next; and whereas the said Simon Rothschild and Frank Rothschild, by their attorney, hath assigned errors and filed the same, which now remain in the clerk's office of the supreme judicial court, said to have happened on the said complaint and in the said proceedings and judgment, as follows, to wit:

7 COMMONWEALTH OF MASSACHUSETTS, *Hampden*, } *ss:*

Supreme Judicial Court.

SIMON ROTHSCHILD and FRANK ROTHSCHILD, of the City, County, and State of New York, Plaintiffs in Error,
vs.
ROBERT A. KNIGHT, Assignee, of Springfield, in the County of Hampden, Commonwealth Aforesaid, Def't.

Assignment of Errors.

On a judgment of the superior court, begun and holden at Springfield, within and for the county of Hampden, at the June sitting, A. D. 1897, wherein the said Robert A. Knight, assignee, is plaintiff and the said Simon Rothschild and Frank Rothschild are defendants.

And the said Simon Rothschild and Frank Rothschild pray for a writ of error to issue, returnable to the supreme judicial court, to be holden at said Springfield, within and for the said county of Hampden, on the first Monday in July, A. D. 1899, and assigns — errors in the record of the process and judgment aforesaid, the following, to wit:

1. That the record discloses that there was no valid and effectual attachment of the goods, estate or effects of the plaintiffs in error upon the writ, which is the necessary foundation of the jurisdiction of said superior court to support any proceeding against an unserved, absent defendant.

2. That the record discloses that the action was an attempt to obtain jurisdiction over these non-resident plaintiffs in error by means of trusteeing a debt due them, and said attempt was an infringement of the rights of the plaintiffs in error as guaranteed by the Constitution of the United States.

3. That the record discloses that neither the plaintiffs in error nor either of them were voluntarily before said superior court, and the record fail*ing* to show any service upon them either personally or by publication, as ordered by said court.

4. That the record discloses that the judgment, if allowed to stand, will deprive these plaintiffs in error of their property, contrary to the provisions of the fourteenth amendment to the Constitution of the United States.

5. That the record discloses a misjoinder of separate inconsistent causes of action in contract and tort, and that there is no averment that they are for one and the same cause of action.

8 6. That the verdict is ambiguous when read in connection with the declaration of the defendants in error, and cannot be taken to support any count in said declaration.

7. That the record discloses that no issue was joined on the third count, and it will not support a verdict.

8. That the record does not disclose any authority for the filing of

the amendment to the declaration of the defendants in error docketed as filed June 19, 1897, and endorsed "Filed June 20, 1897."

9. That the record discloses that the second count of the declaration of the defendants in error will not support the verdict.

10. That the record discloses that the various amendments to the declaration of the defendants in error converted the action into one for the recovery of a penalty, and that such attempt is a- infringement of the rights, privileges and immunities of the plaintiffs in error, guaranteed by the fourteenth amendment to the Constitution of the United States.

11. That the record discloses that there were counts in the declaration of the defendants in error, which under the laws of this Commonwealth involved a penalty, and that a judgment on said counts would be conclusive on these plaintiffs in error as to their liability therefor, and would, without further trial, subject their rights to such penalty, and that such attempt to obtain jurisdiction over the persons or property of these plaintiffs in error, by the trustee process served on a debtor in this State for the purpose of fixing upon them a liability for such penalty is contrary to the provisions of the fourteenth amendment to the Constitution of the United States.

12. That the record discloses that the defendant in error signed the certificate of attendance and travel of two witnesses, F. E. Carpenter and W. S. Miller, required by law to be signed by the witnesses themselves and that the judgment for costs is erroneously made up from said informal certificate.

13. That the record discloses that the entry on the docket charging the trustees was made without the authority or order of said court.

THOMAS J. BARRY,
48 *Congress Street, Boston,*
H. J. JAQUITH,
61 *Equitable Building, Boston,*
Attorneys for Plaintiffs.

9 We, therefore, command you, willing that justice should be done in the premises, that you make known unto the said Robert A. Knight, assignee, that he appear (if he see cause) before our supreme judicial court, to be holden at Springfield, within and for said county of Hampden, on the first Monday of July next, to hear the errors aforesaid, and to show cause, if any he hath, why the said error, if any be, should not be corrected as to justice appertains.

Hereof fail not, and have you there this writ with your doings therein.

Witness, Walbridge Abner Field, Esquire, at Springfield, the twelfth day of May, A. D. 1899.

ROBERT O. MORRIS, *Clerk.*

Officer's Return.

HAMPDEN, *ss:*

CITY OF SPRINGFIELD, *May* 24, *A. D.* 1899.

By virtue of this writ I this day, at 55 minutes past 11 o'clock in the forenoon, summoned the within-named Robert A. Knight to appear at court, as within directed, by giving to him in hand a true and attested copy of this writ.

GEORGE B. MILLER,
Deputy Sheriff.

Fees.

Service	50
Travel	08
Copy	1.00
Fees paid	1.58

Motion to Amend Assignment of Error.

COMMONWEALTH OF MASSACHUSETTS, *Hampden,* } *ss:*

Supreme Judicial Court.

SIMON ROTHSCHILD and FRANK ROTHSCHILD
vs.
ROBERT A. KNIGHT, Assignee. } Law. No. 32.

Now come the plaintiffs in error and move to amend their assignment of error by adding the following:

14. That the record discloses that the writ was entered late without the consent of the plaintiffs in error, and without order of the court.

10 15. That the record discloses that the defendant in error had affirmed the sale to the plaintiffs in error and had waived all right, if any existed, to an action in tort.

16. That the record discloses that the judgment, if allowed to stand, will impair the obligation of contracts, contrary to the Constitution of the United States.

17. That the record discloses that the superior court did not give full faith and credit to the judicial proceedings of the courts of New York, as required by the Constitution of the United States.

By their attorneys, THOMAS J. BARRY,
HARRY J. JAQUITH.

Filed June 9th, 1899.

Indorsed on back: Sitting in Boston. June 20, 1899. Amendment allowed. Per Holmes, J. Att.: John Noble, clerk, &c.

Officer's Return.

HAMPDEN, *ss:*

JULY 1ST, A. D. 1899.

I have this day served the within precept upon the within-named Robert A. Knight, assignee, by leaving at his last and usual place of abode, with his wife, a true and attested copy thereof.

GEORGE B. MILLER,
Deputy Sheriff.

Fees.

Service	50
Travel	08
Copy	50
Paid	1.08

11 *Plea of Defendant in Error.*

COMMONWEALTH OF MASSACHUSETTS, *Hampden,* } *ss:*

Supreme Judicial Court.

SIMON ROTHSCHILD ET AL., Plaintiffs in Error,
vs.
ROBERT A. KNIGHT, Assignee, Defendant in Error.

Plea of defendant in error.

And now comes Robert A. Knight, assignee, the defendant in error, and says there is not any error in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays that the court here may proceed to examine as well the record and proceedings aforesaid as the matter aforesaid assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed.

And the defendant in error in answer to the assignment of error numbered 3, denies the allegations therein, and further says that upon July 8, 1896, it appearing in said suit that the plaintiffs in error were not inhabitants of this Commonwealth nor residents therein at the time of service of the writ in said suit, and that they had no last and usual place of abode nor any tenant, agent or attorney known to said defendant in error, and that no personal service of said writ had been made upon said plaintiffs in error, it was ordered by the superior court that the defendant in error give notice to said plaintiffs in error of the pendency of said suit by publication or by personal service of said order, that they might appear and take upon themselves the defense of said action, all of which fully appears by the records of said case, said order of notice being returnable the first Monday of September, 1896, to wit: September 7, 1896; and the defendant in error further says that said notice was given to plaintiffs in error as ordered by said superior court, but

that by accident and mistake the affidavit of publication and service of said order of notice was not until recently returned to the files of said superior court, but he says that it has now been returned and is a part of the record of said case. And he further says that the plaintiffs in error were voluntarily before said superior court, and that they appeared upon September 16, 1896, in said suit, and pleaded thereto by their counsel, C. C. Spellman, Esquire, of said Springfield, and later by other additional counsel, and that they thereafter personally appeared and contested said suit and were heard in trial in said superior court and later before the full bench of this court, to which said case was carried by them upon a bill of exceptions through their counsel, C. C. Spellman, aforesaid,
12 all of which said record shows. And he says that plaintiffs in error thereby submitted themselves and became subject to the jurisdiction of said superior court and of this court.

And the defendant in error further says, in answer to the assignment of error numbered 12, that the certificate of the two witnesses therein referred to was signed in their names by Robert A. Knight, duly authorized as their agent to sign said certificate, and he further says that the plaintiffs in error had the right to be present at the taxation of the costs referred to in said assignment of error and to appeal therefrom, if they so desired, and that by failing to avail themselves of said rights they have waived the same, and that, further, they have not raised said point in their exceptions or brief thereon before this court, and that said taxation of costs and said witness certificate are not now revisable, but are conclusive upon said plaintiffs in error and that no error in said judgment relating to the costs can now be shown or availed of by said plaintiffs in error by writ of error. And he further says that even if it were to be held that said judgment, so far as it relates to the costs, were erroneous and might now properly be corrected upon writ of error, yet that would not affect the said judgment so far as it relates to the debt or damage, and in that case the error in said costs could be corrected by this court without otherwise affecting said judgment.

And the defendant in error further says that no other matters have been assigned as errors by said plaintiffs in error except such as are matters of form which might by law have been amended, and that no error in law has been assigned, which occurred after verdict in said suit, that the judgment in said action was in conformity with the verdict, even if it was not in conformity with the allegations of the parties in said suit, and he denies that the constitutional rights of the plaintiffs in error have been infringed or that the record discloses that said courts did not have jurisdiction of said suit and the parties thereto.

And the defendant in error denies all the allegations of fact contained in said assignment of error.

And the defendant in error prays that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, and that this writ of error may be quashed.

By his attorneys, ROBERT A. KNIGHT,
RICE, KING & RICE.

Filed July 7th, 1899.

13 *Motion of Defendant in Error to Amend Plea.*

COMMONWEALTH OF MASSACHUSETTS, *Hampden*, } ss:

Supreme Judicial Court.

SIMON ROTHSCHILD ET AL., Plaintiffs in Error,
vs.
ROBERT A. KNIGHT, Assignee, Defendant in Error.

Amendment to plea of defendant in error.

And now comes Robert A. Knight, assignee, the defendant in error, and moves to amend his plea in said action by adding thereto the following:

"And the defendant in error, in answer to the assignment of error numbered 8, denies the allegations therein, and he says that the amendment to the declaration in said suit therein referred to was indorsed as follows:

"This may be filed and allowed.

E. N. HILL,
Defendant's Attorney."

And he says that said E. N. Hill orally appeared for plaintiffs in error, then the defendants in said suit, in the superior court, on June 21, 1897, before the trial of said case, and then and there requested the clerk to enter his appearance for said plaintiffs in error, then the defendants, and that said E. N. Hill thereafter tried said case for said plaintiffs in error, acting as their attorney, and that when said Hill indorsed said amendment, as above set forth, and when said amendment was filed, the said Hill had full authority as attorney for plaintiffs in error to consent to said amendment and to indorse it as above set forth, in behalf of plaintiffs in error.

By his attorneys, RICE, KING & RICE.

Indorsed on back: Sept. 8, 1899. Allowed by consent. James M. Morton, J. S. J. C.

14 *Motion to Have Defendant Withdraw His Plea.*

COMMONWEALTH OF MASSACHUSETTS, *Hampden*, } ss:

Supreme Judicial Court.

ROTHSCHILD ET AL.
vs.
KNIGHT, Assignee.

Now come the plaintiffs in error and move that the defendant in error be ordered to elect either to withdraw his plea of "*in nullo est erratum*" and rely upon his traverse of the plaintiffs' assignment of

error or to strike out all of his plea except the first and last paragraphs thereof.

By their counsel, T. J. BARRY,
H. J. JAQUITH.

Exemplification of Proceedings.

COMMONWEALTH OF MASSACHUSETTS, } ss:
Hampden, }

I, Robert O. Morris, clerk of the superior court of said Commonwealth of Massachusetts, for the county of Hampden, do hereby certify that among the files and records of said superior court for the said county of Hampden, in the case of Robert A. Knight, assignee, *vs.* Simon Rothschild *et al.* & trs. it is thus contained:

Writ.

[L. S.] COMMONWEALTH OF MASSACHUSETTS, } ss:
Hampden, }

To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of Simon Rothschild and Frank Rothschild, copartners, doing business under the firm name and style of S. Rothschild and Brother, both of the city, county and State of New York, to the value of ten thousand dollars, and summon the said defendants (if they may be found in your precinct) to appear before our justices of our superior court, at our clerk's office at Springfield, within our county of Hampden, on the first Monday of May next; then and there in our said court to answer unto Robert A. Knight, of Springfield, aforesaid, in his capacity as assignee in insolvency of the estate of James McKeon, of said Springfield, in an action of contract or tort, to the damage of the said plaintiff (as he say-) the sum of ten thousand dollars, which
15 shall then and there be made to appear, with other due damages. And whereas the said plaintiff says that the said defendants have not in their own hands and possession, goods and estate to the value of ten thousand dollars aforesaid, which can come at to be attached, but ha- intrusted to, and deposited in the hands and possession of John M. Smith and Peter Murray, both of Springfield, aforesaid, copartners, doing business at said Springfield, under the firm name and style of Smith & Murray; James A. Houston and Alexander Henderson, copartners, doing business under the firm name and style of Houston & Henderson, in Boston, in our county of Suffolk; George A. Plummer, doing business in Boston, aforesaid, under name and style of George A. Plummer & Company; Barnard, Sumner & Putnam Company, a corporation duly established by law, and having its usual place of business in Worcester, in our county of Worcester; N. S. Liscomb and A. G. Liscomb, both of Worcester, aforesaid, copartners, doing business under firm name and style of N. S. Liscomb & Son, trustees of the said defendant goods, effects, and credits to the said value:

We command you, therefore, that you summon the said trustees, if they may be found in your precinct, to appear before our justices of our said court, as aforesaid, to show cause, if any -he- ha- why execution to be issued upon such judgment as the said plaintiff may recover against the said defendant in this action (if any) should not issue against goods, effects, or credits in the hands and possession of said trustee-.

And have you there this writ, with your doings therein.

Witness, Albert Mason, Esquire, at Springfield, the seventeenth day of April, in the year of our Lord one thousand eight hundred and ninety-six.

ROBERT O. MORRIS, *Clerk.*

Upon which writ are the following returns by the officers who served the same:

Returns.

HAMPDEN, *ss:*

APRIL 17TH, A. D. 1896.

By virtue of this writ, I this day, at 45 minutes past 12 o'clock in the afternoon, summoned the within-named Smith & Murray, trustees, to appear and answer at court, as within directed, by giving in hand to Peter Murray a true and attested copy of this writ.

ORRILUS W. STUDLEY,
Deputy Sheriff.

Fees.

Service	.50
Travel	.08
Copy	.50
	$1.08

16 SUFFOLK, *ss:*

BOSTON, *April 18th*, 1896.

By virtue of this writ, I this day summoned the within-named trustees, James A. Houston, Alexander Henderson and George A. Plummer each to appear and show cause at court, as within directed, by delivering at 5 minutes past 11 o'clock, a. m. to James A. Houston and Alexander Henderson, and by delivering in hand at 10 minutes past 11 o'clock, a. m. to George A. Plummer, each an attested copy of this writ.

ALBERT C. TILDEN,
Deputy Sheriff.

Fees.

Service	$1.50
Copies	3.00
Travel	1.60
	$6.10

On the back of said writ are the following indorsements, to wit:

No. 195. Robert A. Knight, assignee, plaintiff. Simon Rothschild & *al.*, defendant-. Smith & Murray & *al.*, trustees. Entry, 1st Monday May, 1896. Judgment, March 6, 1899. Damage, $7,071.63; costs, $91.07—$7,162.70. Execution issued March 22, 1899.

Plaintiffs' Costs.

Writ	1.80
Service	1.08
"	6.10
Entry	3.00
Travel	3.63
Term fee	25.00
Pub. notice	8.28
Attorney's fee	3.75
Witnesses	27.90
Brief	10.00
Subpœna	.53
	$91.07

17 *Damage.*

Principal	6,420.00
Interest	651.63
	$7,071.63

From the office of Robert A. Knight, Springfield, Mass.

At a return day of said court, to wit, on the fourth day of May, in the year eighteen hundred and ninety-six, the plaintiff appeared by his attorney, Robert A. Knight, and entered the above action, and filed his declaration in the case, which is in the words as follows:

Declaration.

COMMONWEALTH OF MASSACHUSETTS, *Hampden*, } *ss:*

Superior Court.

ROBERT A. KNIGHT, Assignee, }
vs.
SIMON ROTHSCHILD ET AL. }

MAY 4TH, 1896.

Plaintiff's declaration.

And the plaintiff says the defendant owes him the sum of six thousand, four hundred and seventy-seven and fifty one-hundredth-($6,477.50) dollars for goods delivered by the insolvent debtor within named to the defendants, according to the schedule hereto annexed.

And this by his attorney, ROBERT A. KNIGHT.

Account Annexed.

SPRINGFIELD, MASS., *Dec.* 1, 1895.

S. Rothschild & Bro. to James McKeon, Dr.

To 1 martin cloak		$125.00
No. 883, martin cloak		95.00
No. 300, seal cloak		145.00
Seal cloak		225.00
Jacket		140.00
"		180.00
"		235.00
"		175.00
18		
Jacket		225.00
Persian cloak		125.00
" "		125.00
Mink cape		250.00
" "		185.00
" "		185.00
" "		170.00
" "		140.00
Persian cape		120.00
" "		120.00
" "		150.00
" "		110.00
" "		170.00
" "		90.00
" "		70.00
" "		140.00
Seal jacket		200.00
Persian cape		140.00
Seal cape		190.00
Mink cape		215.00
Seal cape		165.00
" "		115.00
" "		95.00
" "		160.00
" "		60.00
" "		60.00
Persian cape		95.00
Seal jacket		170.00
Cape		65.00
"		125.00
Martin		125.00
Seal		125.00
"		150.00
19		
Electric-seal cape		45.00
" "		40.00
" "		62.50

Seal cape	155.00
" "	125.00
Cloth fur-lined	67.50
" "	65.00
" "	67.50
	$6,577.50
Dec. 1, 1895. Cr. by cash	100.00
	$6,477.50

And on the eleventh day of said May, in the year eighteen hundred and ninety-six, said trustee, John M. Smith, of the firm of Smith & Murray, appeared by his attorney, Daniel E. Leary, and filed his answer, which is in the words as follows:

Trustee Smith & Murray's Answer.

HAMPDEN, *ss:*

Superior Court.

MAY 9, 1896.

ROBERT A. KNIGHT, Assignee,
vs.
SIMON ROTHSCHILD ET AL. & TRUSTEE.

Trustee's answer.

And now comes John M. Smith of the firm of Smith & Murray, named as trustee in the above-entitled claim, — for answer says that at the time of the service of process upon them in this action that they had in their hands six hundred sixty-nine dollars and twenty-seven cents of the money, goods and property belonging to said defendants and no more, and they submit themselves to be examined thereon.

They ask that they may be discharged and for their costs.

JOHN M. SMITH.

HAMPDEN, *ss:*

SPRINGFIELD, *May* 9, 1896.

Then personally appeared John M. Smith of the firm of Smith & Murray and made oath that the above subscribed by him is true to the best of his knowledge and belief.

Before me—

DANIEL E. LEARY,
Justice of the Peace.

On the third day of July, in the year eighteen hundred and ninety-six, by consent, said trustee, Alexander Henderson, representing Houston & Henderson, filed his answer, to wit:

20 *Trustee Houston & Henderson's Answer.*

COMMONWEALTH OF MASSACHUSETTS, *Hampden*, } ss:

Superior Court, — Term, 1896.

ROBERT A. KNIGHT, Assignee,
vs.
SIMON ROTHSCHILD & AL. & TRUSTEES.

Answer of alleged trustee.

And now Alexander Henderson, representing Houston & Henderson, summoned as trustee of the principal defendant in the above-entitled action, appears and makes answer that, at the time of the service of the plaintiff's writ upon him, that we were owing to Simon Rothschild & Brother, twenty-three hundred and thirty-seven $\frac{86}{100}$ dollars ($2,337.86), but had not at said time of service any other goods, effects, or credits, of said defendant in his hands or possession, and of this he submits himself to examination upon his oath.

ALEXANDER HENDERSON.

JUNE 30TH, 1896.

Then the above-named Alexander Henderson made oath that the foregoing answer, subscribed by him, is true.

Before me—

ROBERT M. McLEISH,
Justice of the Peace.

On the eighth day of said July, in the year eighteen hundred and ninety-six, the plaintiff filed a motion for order of notice to the principal defendants, which motion is in the words as follows:

Motion for Notice.

COMMONWEALTH OF MASSACHUSETTS, *Hampden*, } ss:

Superior Court.

ROBERT A. KNIGHT, Assignee,
vs.
SIMON ROTHSCHILD ET AL. & TRUSTEES. } Docket No. 1071.

Motion for order of notice to principal defendants.

Now comes the plaintiff in the above-entitled cause and says that the defendants are residents of the city, county and State of New York, and are so described in the writ in said cause. That said action was returnable to this court on the first Monday of May last

That service of said writ has not been made upon the defend-
21 ants for the reason that the defendants, nor either of them, were inhabitants of this Commonwealth, nor were they residents therein at the time of the service of said writ; and that they nor either of them have no last and usual place of abode, tenant, agent or attorney in this Commonwealth, known to the plaintiff.

Wherefore, the plaintiff prays that an order of notice to said defendants may issue.

ROBERT A. KNIGHT,
Assignee, Plaintiff.

Which motion was allowed by Hon. Elisha B. Maynard, justice, and notice was issued, which is in the words as follows:

Notice.

COMMONWEALTH OF MASSACHUSETTS, *Hampden County,* } ss:

Superior Court.

JULY 8TH, A. D. 1896.

ROBERT A. KNIGHT, of Springfield, in said County, in His Capacity as Assignee in Insolvency of the Estate of James McKeon, of said Springfield, Plaintiff,

—

SIMON ROTHSCHILD and FRANK ROTHSCHILD, Copartners, Doing Business under the Firm Name and Style of S. Rothschild & Brother, Both of the City, County, and State of New York, Defendants; John M. Smith and Peter Murray, Both of Springfield, Aforesaid, Copartners, Doing Business at said Springfield under the Firm Name and Style of Smith & Murray; James A. Houston and Alexander Henderson, Copartners, Doing Business under the Firm Name and Style of Houston & Henderson, in Boston, in Our County of Suffolk; George A. Plummer, Doing Business in Boston, Aforesaid, under Name and Style of George A. Plummer & Company; Barnard, Sumner & Putnam Company, a Corporation Duly Established by Law and Having Its Usual Place of Business in Worcester, in Our County of Worcester; N. S. Liscomb and A. G. Liscomb, Both of Worcester, Aforesaid, Copartners, Doing Business under Firm Name and Style of N. S. Liscomb & Son, Trustees.

This is an action of contract or tort to recover $10,000, as by writ on file, dated the 17th day of April, A. D. 1896.

It now appearing upon the suggestion of the plaintiff's counsel, that the defendants are not inhabitants of this Commonwealth, nor were resident therein at the time of the service of the writ in this case; and it further appearing, that the defendants have no last and usual place of abode, nor any tenant, agent, or attorney known to the said plaintiff, and that no personal service was made upon the said defendants:

22 It is now ordered by the court that the plaintiff give notice to the said defendants of the pendency of this action, by causing an attested copy of this order to be published in the Springfield Evening Union, a public newspaper published at Springfield, in the county of Hampden, and State of Massachusetts, once a week, three weeks successively, the last publication to be at least thirty days before the first Monday of September next, or by causing the defendants to be served with an attested copy of this order fourteen days at least before the said first Monday of September, that they may then and there appear, and take upon themselves the defense of this action. And that this action be continued until notice shall be given to the said defendants, agreeably to this order.

ROBERT O. MORRIS, *Clerk.*

And within ten days from said first Monday of September, to wit: on the sixteenth day of September, in the year eighteen hundred and ninety-six, the said defendants appeared by their attorney, Charles C. Spellman, which appearance is in the words as follows:

Appearance.

Superior Court, Hampden County.

SEPT. 16TH, 1896.

ROBERT A. KNIGHT, Assignee, *vs.* SIMON ROTHSCHILD & AL. & TR. } No. 1071.

Enter my appearance for the defendants.

CHAS. C. SPELLMAN.

And on the twelfth day of October, in the year eighteen hundred and ninety-six, the plaintiff filed a motion to amend his declaration, which is in the words as follows, to wit:

Motion to Amend Declaration.

HAMPDEN, *ss:*

Superior Court.

OCTOBER 9TH, 1896.

ROBERT A. KNIGHT, Assignee, *vs.* SIMON ROTHSCHILD ET AL.

Motion to amend declaration.

And now comes the plaintiff and moves to amend his declaration by adding thereto the following, to wit:

Count 2. And that the plaintiff says that he is the assignee of the insolvent estate of James McKeon; that said McKeon, being insolvent, and in contemplation of insolvency, made a sale, transfer or conveyance of certain property mentioned and described in the

schedule attached to the original declaration filed in said case,
23 to the defendants, and that said sale, assignment, transfer or conveyance was made with a view to prevent the property from coming to his assignee in insolvency, and to prevent the same from being distributed under the laws relating to insolvency and to defeat the object of, and to impair, hinder, impede and delay the operation and effect of, and to evade the provisions of said laws.

Wherefore, the plaintiff says he is entitled to recover the value of said property as assets of the insolvency.

ROBERT A. KNIGHT, *Pro Se.*

Upon the back of said motion is the following indorsement, to wit:

May be filed and allowed. Chas. C. Spellman, attorney for defendants.

Which amendment was consented to by defendants' attorney. And on the seventeenth day of said October, in the year eighteen hundred and ninety-six, the defendants filed their answer, which is in the words as follows, to wit:

Answer.

COMMONWEALTH OF MASSACHUSETTS, *Hampden,* } ss:

Superior Court.

OCTOBER 10TH, 1896.

ROBERT A. KNIGHT, Assignee,
vs.
SIMON ROTHSCHILD & AL.

Defendants' answer.

And now come the defendants and deny each and every allegation in the plaintiff's original and amended declaration.

By attorney, CHAS. C. SPELLMAN.

Upon the back of which answer is the following indorsement, to wit:

May be filed and allowed. Robert A. Knight, plaintiff. C. C. Spellman.

And on the nineteenth day of June, in the year eighteen hundred and ninety-seven, the plaintiff appeared by his attorneys, Rice King & Rice, and filed a second motion to amend his declaration, which is in the words as follows, to wit:

24 *Second Motion to Amend Declaration.*

COMMONWEALTH OF MASSACHUSETTS, *Hampden*, } ss:

Superior Court.

JUNE 21ST, 1897.

ROBERT A. KNIGHT, Assignee, }
vs.
SIMON ROTHSCHILD ET AL. }

Motion to amend declaration.

And now comes the plaintiff and moves to amend the declaration in the manner following, to wit:

In count 2, by inserting after the words "in contemplation of insolvency" the words "within six months before the filing of the petition in insolvency," and by inserting after the words "to the defendants" the words "who then had reasonable cause to believe him to be insolvent and in contemplation of insolvency." And further, by adding the following, to wit:

Count 3. And the plaintiff further says that he is the assignee in insolvency of James McKeon, that said James McKeon being insolvent within six months before the filing of the petition in the insolvency court, with a view to give a preference to the defendants, who were creditors of and who had claims against him, made a payment, pledge, assignment, transfer and conveyance of a certain part of his property, a schedule whereof is annexed to *to* the original declaration, to the defendants, they, the defendants, then having reasonable cause to believe the said James McKeon was insolvent or in contemplation of insolvency, and that such payment, pledge, assignment and conveyance was made in fraud of the laws relating to insolvency.

And this by his attorneys.

RICE, KING & RICE.

Upon the back of which motion is the following indorsement, to wit:

This may be filed and allowed. E. N. Hill, defendants' attorney.

Which amendment was consented to by the defendants' attorney, E. N. Hill. And on the twenty-first day of said June, eighteen hundred and ninety-seven, the case was committed to a jury, sworn to try the same, who returned their verdict therein, which is in the words as follows:

25 *Verdict.*

HAMPDEN, *ss:*

Superior Court, June Sitting, A. D. 1897.

ROBERT A. KNIGHT, Assignee, Plaintiff,
—
SIMON ROTHSCHILD & AL., Defendants.

The jury find for the plaintiff and assess damages in the sum of $6,420.00.

E. C. SMITH,
Foreman of Second Jury.

And on the twenty-sixth day of June, in the year eighteen hundred and ninety-seven, the defendants appeared by their attorney, E. N. Hill, and on the twenty-ninth day of said June, eighteen hundred and ninety-seven, the defendants filed a motion for a new trial, which is in the words as follows:

Motion for New Trial.

COMMONWEALTH OF MASSACHUSETTS, *Hampden,* *ss:*

Superior Court.

ROBERT A. KNIGHT, Assignee,
vs.
SIMON ROTHSCHILD ET AL.

And now comes the defendants and move the court to grant them a new trial in the above-named cause for the following reasons: Because the verdict is against the evidence and against the weight of the evidence, because the damages awarded by the jury were excessive.

By their attorney, E. N. HILL.

It is agreed by the plaintiff and defendants that this motion is substantially the same as filed in this case in due time, that the original motion has been lost or mislaid, and that this motion shall take the place of said lost or mislaid motion.

ROBERT A. KNIGHT,
Assignee, Plaintiff.
CHAS. C. SPELLMAN,
Attorney for Defendant.

And on the thirty-first day of July, eighteen hundred and ninety-seven, the defendants alleged sundry exceptions to the opinions and rulings of the court, which being found conformable to the truth,

were allowed and signed by the presiding judge, and the questions were transmitted to the supreme judicial court for consideration. Which exceptions are in the words as follows:

26 *Exceptions.*

COMMONWEALTH OF MASSACHUSETTS, *Hampden,* ss:

Superior Court, June Sitting, 1897.

ROBERT A. KNIGHT, Assignee, vs. SIMON ROTHSCHILD ET AL. and TRS.

Bill of exceptions.

This was an action of tort brought by the assignee in insolvency of one James McKeon, of Springfield, to recover the value of a quantity of fur garments, forty-nine in number, alleged by the plaintiff to have been conveyed by McKeon to the defendants, with a view to give them a preference, or with a view to prevent the property from coming into the hands of the assignee in insolvency, within the meaning of the insolvency laws. To these allegations the defendants made a general denial. The conveyance alleged to be in violation of the insolvency laws was made on the 20th of December, 1895, and McKeon was adjudicated an insolvent, and an assignee of his estate chosen, within six months of the conveyance. The suit was brought April 17th, 1896. There was a verdict for the plaintiff for six thousand, four hundred and twenty dollars, and the defendants alleged exceptions.

All of the evidence in any way material to the decision of the questions involved in this bill of exceptions is in substance as follows:

"The plaintiff called Samuel B. Spooner, the register of insolvency for the county of Hampden, who produced papers in the insolvent estate of James McKeon. It appeared that the proceedings were involuntary. The petition was filed January 7th, 1896. The warrant issued January 10th, 1896. The schedules of creditors and of property signed by the debtor, McKeon, were produced. The plaintiff was elected assignee on the 20th day of February, 1896."

The plaintiff called EDWARD H. LATHROP, who testified in substance as follows:

"I am a practicing attorney of this city (Springfield). On the 20th day of December, 1895, I had a conference with Mr. Frank Rothschild, Jr., Mr. Spellman, and Mr. McKeon at the Haynes house in Springfield. I should be uncertain about the date except for having consulted a memorandum since. It was in December, and I have no doubt but what the 20th is the day. No one else was present besides the gentlemen whom I have mentioned. According to my impres-

sion, it was first Mr. Rothschild, Mr. McKeon, and myself. Mr.
27 Spellman subsequently appeared. I was sent for to go to a certain room in the Haynes house. I went there and my recollection is I found Mr. Rothschild and Mr. McKeon. After the introduction Mr. Rothschild began the conversation, which was substantially that Mr. McKeon was in difficulty and he had made a proposition to him, inasmuch as he was one of Mr. McKeon's heaviest creditors, to take some of the goods back with him to New York for the purpose of raising money on them. He stated that the season here in Springfield for that class of goods was practically over, and there was always more or less of a market in New York such as Springfield did not afford, and he could dispose of the goods to much better advantage than they could be sold for here in Springfield. I said to Mr. Rothschild and Mr. McKeon, addressing them both, that that was a very risky performance for Mr. McKeon to have anything to do with; that he was insolvent, and he knew it, and of course Mr. Rothschild knew it, and to take those goods out of his stock under circumstances such as he indicated his desire to do would be very liable to result in disaster to both of them, at least to Mr. McKeon, if he ever expected an ultimate discharge in bankruptcy or insolvency.

"I then suggested to Mr. Rothschild or Mr. McKeon the condition of the law in Massachusetts, as I understood it, and as it differed from the law in New York, especially indicating to them that no preference of creditors could be made in Massachusetts as we knew very well could be done in New York, and telling Mr. McKeon and Mr. Rothschild the possible effect upon both of them. For instance, I said to Mr. Rothschild if that thing was done, and it was known of afterwards, and I didn't see why it shouldn't be known, the assignee of Mr. McKeon, if he went into insolvency, could recover back that property, and it would defeat Mr. McKeon's discharge in bankruptcy. I asked Mr. Rothschild—I asked Mr. McKeon, not Rothschild, apologizing to Mr. Rothschild for doing it, if he could trust this man. He said he could, he had known him for years. Mr. Rothschild addressed Mr. McKeon as 'Jimmy,' and they seemed to be excellent friends, and I think, I can't tell about what time, but my impression is that some time during this conversation Mr. Spellman came in and we went over together substantially the same line of talk that I have already indicated to, in Mr. Spellman's presence. Of course Mr. Spellman assented to the propositions as I had suggested them, with reference to the effect that this transaction might have upon both these parties. There was no disagreement between us as to the law about it, and that was substantially the talk. Before that conversation was over I think there were two suggestions made by Mr. Rothschild. I don't think it lies so definitely in my mind as it did immediately after that time. Mr. Rothschild's suggestion was that he should take those goods down to New York
28 and turn them into money, and I don't remember that there was any suggestion made that the whole of the money was to be used for the payment of Mr. McKeon's indebtedness, but I have omitted one thing. There was a suggestion made by Mr. Rothschild

as to the probability of his being able to effect a compromise with Mr. McKeon's creditors in New York, and he made this suggestion, that he thought he was the one man in New York who could do it, if it could be done at all, and that the proceeds from the sale of these goods could be used in the payment of the percentage of Mr. McKeon's debts. I think it was at that point that I asked Mr. McKeon if he could trust Mr. Rothschild in such a proceeding as that, inasmuch as when he let the goods go out of his hands he had no opportunity of reclamation of the goods if he wanted. There was another suggestion by Mr. Rothschild, I think it was early in the conversation, that out of the goods he could satisfy their claim and he made some suggestions to Mr. McKeon that excited suspicion of these two parties, and I think the history of their former dealings, that he was entitled to some consideration in that line, and then, of course, followed the suggestion with reference to the effect of the preference such as that transaction would really be, that I told, I think. I am indefinite whether there was any further talk about any other claims in Mr. Rothschild's hands. I think there was some allusion made to a claim of the other house of Rothschilds, I don't recall what it was now."

On cross-examination he testified:

"I said I was not sure in my statement that when I came there I found Mr. McKeon and Mr. Rothschild alone or whether Mr. Spellman was there when I first went in. I may not be right; I think Mr. Spellman came afterwards. I had not been with Mr. McKeon before that day. This was very early in the morning. I had just got to my office. I had seen Mr. McKeon the day before. I was acting as counsel for him at that time. I do not remember who sent for me. Either a messenger from Mr. McKeon's store or a message by telephone; I can't tell which. My recollection is after Mr. McKeon presented Mr. Rothschild and myself, that Mr. Rothschild opened the conversation and carried it on substantially. I would not put it as broadly as to say this conversation was carried on principally upon the subject of making some kind of a settlement, compromise, and the method of arranging it, of Mr. McKeon's affairs. A compromise was talked about, but when you say that the conversation was carried on principally in reference to a compromise, I should hardly say so. A talk of compromise was involved in this conversation. One claim was alluded to by Mr. Rothschild, a claim held by Mr. Carpenter, the name of the creditor I don't remember, but Mr. Rothschild said that he was ready to give Mr. Carpenter, to advance a partial payment of this claim. That was because
29 of the possibility of an attachment being made before those goods could be got out of that store. Mr. Rothschild said then, and he said it more than once, that he was willing to help Mr. McKeon and put him on his feet. They gave me to understand and told me that this conference was to consider that question, in part, to discuss the general situation, and they wanted me there as counsel representing Mr. McKeon. Mr. McKeon said he wanted me there during the conversation. There was a suggestion made that Roths-

child ought to have a little more favor if he was going to do so much. I said it must not be done. I said several times, with considerable emphasis, to Mr. McKeon, that it was altogether an extraordinary proceeding and a matter that professionally I could not countenance.

"When I referred to extraordinary proceedings I had reference to the proceeding without reference to any confidence Mr. McKeon had in Mr. Rothschild. The surrender to Rothschild of the property, the advance of money was certainly made subject to the contingency of the surrender to him of the property. I don't remember that the term security was used, but certainly the money was not to be advanced unless he got the property. Rothschild said there was a better market in New York, and he thought they could be disposed of quicker than here and at better prices. I left them there, I told Mr. McKeon that if he did that, he must do it upon his own responsibility. They all acceded to the effect of giving security for a past debt. There was no dispute as to the illegality of giving security for a past debt. I don't remember that Rothschild made any such distinction as that it wasn't a question of preference at all, he wanted to help Mr. McKeon. There was a suggestion by Rothschild to the effect 'If we can get the goods and realize from them, or I can have them so that I can feel safe in advancing, I feel quite sure I can carry a compromise through and get you on your feet in a week.' I think he said he would head the list in the settlement proposed. My recollection is not definite. It is altogether possible that Mr. Rothschild made a suggestion that 'It isn't a matter of preference, I am doing this to help Mr. McKeon.' 'If Mr. Rothschild should say he did I should not contradict him.' I made an affidavit in the matter in New York, and I should think if it was so stated in the affidavit, I probably did say that I had read the affidavit of Mr. McKeon. My recollection is that I had stated that I had read Mr. McKeon's affidavit. Whether I went so far as to say that Mr. McKeon's affidavit was correct in all respects I should be doubtful. I could tell better by seeing the copy or the affidavit, of course. I don't say that after I explained the matter of the law so that those gentlemen understood just what position they were in, the question of preference to Messrs. Rothschild & Bro., was not further considered. I don't know that special reference was made after I had stated the conditions, that specific reference to the matter of preference was afterwards made.

30 "The question of the assistance that was to be rendered, and the manner of bringing it about, was certainly talked about. I didn't intend my clients should do anything in violation of the law with my approval, and I was pretty emphatic about it, and I should say that I expressed myself to Mr. McKeon very strongly in antagonizing the entire proposition. I did not favor the scheme a-way, and I told him the reasons I couldn't approve under any circumstances. It wasn't because I didn't know the parties well enough to know what amount of confidence could be placed. I took Mr. McKeon's say- so concerning Mr. Rothschild, who is certainly a pleasant-appearing gentleman, and a man of a good deal of intelli-

gence, but I based it entirely on the attitude that Mr. McKeon was to be left an insolvent in the State of Massachusetts, having part in this transaction. McKeon said substantially, several times, that he thought the firm of Rothschild & Bro. was of such a standing that he had confidence in the assurances of Mr. Rothschild, and he thought a settlement might be made. He was quite emphatic in his confidence in the house of Rothschild, and especially in Mr. Frank Rothschild, Jr. I shouldn't say that he expressed himself in any manner or form then that he was going to give these people any advantage. I don't think that I waited for him to give me to understand that he wasn't going to follow my advice in that respect. I didn't stay. I got out. I don't think that he indicated what he was going to do while I was there. I know what he did do. I knew afterwards that he did send some goods to New York. I had not before me a statement of Mr. McKeon's affairs as to the amount of his liabilities or his assets at that time. I am indefinite whether he had given me, up to that time, any statement of his assets. I don't remember. I knew by Mr. McKeon. I knew his situation, so far as representations made by him, but whether I had a written statement or not I am uncertain. Very likely I told him the day before that he had better go to his store and make a statement of his affairs, so as to show just where he was. I had not a definite recollection that I did, but it is very probable. I knew more than that there were at that time claims pressing Mr. McKeon, and he hadn't the ready money to settle them. He made some payments, or partial payments, as I recollect, within a short time, before that day. It is altogether probable that Mr. McKeon expressed himself as confident that he might pull through if he had the assistance of somebody, and I do not have any definite recollection. It is my impression that he did say something like that. He could not have said that his assets were fully as much as his liabilities. I don't think that he did say that, because I knew better, and he must have known better. He said, substantially, that he was very anxious not to go into insolvency, because he had a valuable business, which would be entirely lost to him and be to the disadvantage of the creditors, if that happened. He said that to me privately. It is possible he said that, and I think he did,
31 before Mr. Rothschild. I don't remember whether there was any conversation at that time about procuring an extension. I told Mr. McKeon and Mr. Rothschild that he was insolvent. I had told Mr. McKeon a day or two before that he was insolvent, and I told Mr. Rothschild and Mr. McKeon at that interview, more than once, that Mr. McKeon was legally insolvent. I was speaking as to his legal insolvency and speaking as a lawyer on that question. I think that I did not have at that time a complete detailed statement of his accounts, but I had, I think, a memorandum of the stock before that interview. I don't think up to that time that I had a memorandum showing the condition of his accounts, bills receivable and notes payable. I think I had told Mr. McKeon that he must go through his books and give the detailed result of his books, but I had been told by Mr. McKeon, substantially, the con-

dition of the summary of the books of account. Mr. Spellman was there, acting in the same capacity toward Mr. Rothschild that I was acting for Mr. McKeon."

FRANK E. CARPENTER, called by plaintiff, testified in substance as follows: "I am an attorney-at-law, practicing in Springfield for the last twenty-three years. I knew Mr. McKeon. Previous to December 20th, 1895, I had a claim against him in favor of the Plaut Cloak Company for $609.00 that was overdue. I think I received it about the middle of December, about a week before this transaction. I saw Mr. McKeon about it. I wrote him a letter first, and he called upon me immediately and promised to attend to it at once, I think perhaps the same day, if not the next day, and he did not appear the next day, and if I recollect right, I called at his store, and I saw him, I should think, half a dozen times. As near as I can recollect he said that he hadn't the money then, but that he would have it very soon, later in the day or on the following day. He never refused to pay the bill, always promised to pay it. He repeated substantially this conversation on all the conversations I had with him, which were five or six, quite a number. On the 20th of December, the bill was still unpaid. He never paid any part of the bill."

LILLIAN DIETZ was called by the plaintiff, and so far as her evidence is material to the questions raised in this bill of exceptions, she testified as follows: "I live in Springfield, am a book-keeper, was employed by Mr. McKeon on the 20th of December, 1895; had been employed by him as book-keeper and cashier for six years. Was present in the store on December 20th, 1895. Goods were packed for Rothschild & Brother, and delivered on that day. Mr. Rothschild was not present. Mr. McKeon and myself and one of the boys was present when they went off. Mr. Chapman, an employee of the store, did the packing. The goods were packed in two or three trunks which had been sent out for and brought
32 in. Forty-nine fur garments were packed in those trunks. They were sealskin capes and jackets, Persian lamb, and cheaper grades of goods. At that time I made a list of the goods packed, and have the list with me (list produced). I took the list of the goods as I saw them packed. The list was verified by calling back. I saw each garment put in the trunk. They were packed between eleven and twelve o'clock in the morning. The truckman from the Haynes house took them from the store about twelve o'clock. He was the regular porter connected with the hotel. As I called off those goods I put down the prices or value of them. The figures on the list represent the worth of the goods. The goods had tags on them. In the course of my duties as book-keeper and cashier we kept a ledger and cash book (which were produced). They are in my handwriting and are the regular books of account of Mr. McKeon's business. He examined the books from time to time. I had the handling of all the money that came into the concern and went out of it. The invoices passed through Mr. McKeon's hands. I had them after he got through with them.

The invoices were upon the books, entered there by me. I have examined the books so as to know how much, on the 20th of December, 1895, Mr. McKeon was in debt. On that day he owed $36,470.98. That indebtedness includes the indebtedness to Simon Rothschild & Brother. At the beginning of business on the morning of December 20th, there was $379.00 in cash on hand. On the 20th day of December, in the afternoon, after the furs were shipped, an attachment was placed on the property. From the 20th day of December to the time that the assignee took possession of the property, the store was operated by the sheriff. I remained there in the same capacity as before. I received the money that came in and handed it all to the sheriff every night, so that when the sheriff got through with his affairs he had had all the money that came into my possession during that time. With the exception of goods that were sold for cash there was no material change in the situation from the time of the 20th day of December, 1895, up to the time that the assignee took possession. Some accounts had been collected, and that money was turned over to the sheriff. There were no new accounts made during the time. In addition to my duties as book-keeper and cashier, I waited on customers. I knew the cost price of all garments that came into the store during the time that I was book-keeper, and I knew the selling price. I could go through the store and identify the goods. I knew what the cost of those goods were in the store in Springfield. I had been familiar with that branch of the business for six years. I know what was the fair value of those forty-nine garments that were taken and put in trunks and shipped to New York on the 20th day of December, 1895. I sold such goods myself. I knew what they cost. The value of those forty-nine garments was between sixty-five and
33 sixty-six hundred dollars. I have a memorandum that shows exactly. The exact figures are $6,577.50."

On cross-examination she testified as follows:

"This list is the transcript of the indebtedness. The other is a memorandum made on the 21st day of December, the day after the goods were sent. I made the original on the day they were sent and this is a duplicate. I sent the original to Rothschild & Bro. I carried out the original in ink. This is in pencil. I carried out against the several figures $6,577.50. As against the charges I merely put down the prices on the books. The worth of the garments was on the tags. I didn't think of it any more than to reproduce it on this piece of paper. That was the cost price. I took each one of these articles and made out the cost price to Mr. McKeon and said that was the value. I didn't make any examination of the furs at that time with a view, or the garments, with a view to determining their value. I just saw that they were properly packed. I have never had any experience in buying and selling of goods of this class except in the ordinary way over the counter and taking the prices that are given me by somebody else. I didn't fix the price. I never bought goods at the store. I never sold them in bulk except in the way I have explained. I have simply sold a

garment at the store. It wasn't necessary to go through any mental operation to ascertain the value of these goods. A very few of the garments, I don't think over half a dozen, were in the style of the year before. They had been in the store nearly a year. Had been put away for safe keeping and brought forward as garments of old style, a year old. I think they were as valuable as when they first came in. It is true that it was a rather poor season in 1895 for the sale of furs. Of course they were a drug upon the market. It had been a very mild season. There was not a demand for garments of that kind. I presume these facts affected their market value. I did not take these things into account in arriving at a valuation. Just before Mr. McKeon's failure there was another store which he had had which was an outlet of the store here or a branch. It was in Providence. These books do not show the Providence account. I don't know where the Providence books are. I have seen them in the store. I had never had anything to do with keeping them. The Providence store was closed the summer before the failure. We did not make every year a balance account to balance our books for a trial balance. We never did. The books show Mr. McKeon's general condition, his financial condition. We used to take an inventory, an account of stock. We took an account of stock six months before December, which was reduced to writing. These garments which were carried over were given a value on the inventory. I have not got the inventory. Have not seen it
34 lately. The fur garments were inventoried the same as they were put on that bill, at cost. We inventoried everything at cost. On December 20th there was a note paid or taken up at the Hancock bank for three thousand dollars. There was not considerable more money paid to other persons about the same day. There were no other notes taken up that day nor the day before. There were during the week. I don't know to what amount, perhaps five hundred dollars."

On redirect examination she testified:

"I know of no property belonging to Mr. McKeon, except the property in the store. The majority of the bills which were owing to Mr. McKeon were overdue on the 20th of December, 1895."

On recross-examination she testified:

"Mr. McKeon never talked with me about his property. When I said I knew of no other property than this store I was making my statement exclusively as regards the store and the store property and that which was under my observation. I carried all these accounts in my books so as to show when they fell due. I examined the books with a view of determining how each account stood every week. I looked over the accounts every week. Most of the accounts were overdue on December 20th.

"Sometimes I received and accepted goods as they came in. It wasn't a part of my duty to do it. My duties were not confined to the position of book-keeper and cashier. I was on the floor as much as I was in the desk. I was selling goods as much as I was in the

desk. I knew in what condition the goods were in when they came there. I saw them as they were taken out and hung up. I inspected or looked them over, because I used to mark them. I did not examine them when they were put into the trunk more than to see them pass from hand to hand. I didn't look at them. When I marked them, when they came in, I looked at them because Mr. McKeon used to put them on, and I used to look at them for the purpose of examining them to see if they were all right. I did not examine them when they went away. I did not make any more than a casual inspection of them when they went away."

The defendants objected to the admission of the evidence of Miss Deitz as to the value of the furs on the ground that she was not qualified to give her opinion as to values, and duly excepted to its admission.

WALTER S. MILLER, called by the plaintiff, testified: "I am a deputy sheriff. Made the attachment on Mr. McKeon's store on the 20th of December, 1895, on the writ S. F. & A. Rothschild against James McKeon. The attachment was made at thirty
35 minutes past two in the afternoon. I took possession of the store and held it under my attachment and under my insolvency warrant six or eight weeks until the assignee took possession. The store was opened for business every day. Goods *was* sold for cash only. There was no difference in the stock in the store at the time I turned it over to Mr. Knight from what it was when I took possession except the goods which had been sold, and those were represented by the cash received which was $3,640.80. The goods were retailed over the counter. I kept in my employ the same clerks to the date that the assignee came to take possession. This account closed with the day when the assignee took possession. I didn't buy anything to increase the stock. I turned over all that I had received, less my expenses. I also turned over to him the balance of merchandise still in the store. I shouldn't think I sold a quarter of the merchandise in quantity. There was considerable of one class of goods, silk waists, and cheap dresses, that were ready-made, sold out of the stock."

ROBERT A. KNIGHT, the plaintiff, testified: "I live in Springfield. I am an attorney-at-law. I am the assignee of James McKeon. Have been an attorney-at-law between ten and eleven years. Have been practicing here for nine years, lacking a month. To a certain extent a large part of my business is the collection business. I have examined the books of account of Mr. McKeon's estate as to the people who are indebted. I am very generally acquainted with nearly all of these people. I am familiar with the ability of making collections from those people. I think I am able to give a judgment as to the value of those accounts. In my judgment, the fair value of the accounts on the books of Mr. McKeon against people who had been his customers, at the time I took possession of the estate, was about eleven hundred dollars. The total possible value

was a few dollars less than eighteen hundred—seventeen hundred and eighty-four if I remember the exact figures. I received the money from the officer, also the property. I haven't discovered any other property belonging to the debtor. I have searched the records of the registry of deeds, and also made other search with reference to personal property, but discovered none, except the stock of goods and the fixtures, and the money turned over to me by the officer. I don't know where Mr. McKeon is living today. He left Springfield in the early part of May. The last I heard he was in New York city."

On cross-examination he testified as *follows*:

"I heard Mr. McKeon was dead, and I heard afterwards that a telegram was received from him after the date that he was reported dead. I heard he was reported dead about the third of May. I heard that the telegram was received on the fifth day of May.
36 I have collected nearly eleven hundred dollars. I consider it very doubtful about being able to collect anything in addition to it. I have used all respectable and polite ways of collecting, and I have brought suits also. I selected the appraisers. I realized from the stock and the accounts $3,756.50, exclusive of the fixtures. The fixtures sold for four hundred dollars more. Both sales were made by leave of court. I sold about the 25th of February. I was appointed on the 19th, and, I think, it was within a week, from the 20th to the 25th of February. I had no other assets left, except the accounts. I have received between eleven hundred and twelve hundred dollars of the accounts up to this time. The sale was made at private sale, by sealed bids. I notified eight or ten different large concerns that I should offer the stock for sale by sealed bids on a certain day, and also notified them that whatever amount any party bid would be unknown to any other bidder, and the highest bidder should have the goods. I sold them to the highest bidder."

To the admission in Mr. Knight's direct examination of his opinion as to the fair value of the accounts on McKeon's books against people who had been his customers, the defendant duly excepted.

The writ against Mr. McKeon in favor of S. F. & A. Rothschild, dated the 19th of December, 1895, upon which the attachment was made by the witness Miller, on the afternoon of December 20th, was admitted in evidence. The plaintiff against the defendant's objection was permitted to introduce a certified copy of the affidavit of Simon Rothschild, taken in the case of Simon Rothschild and Frank Rothschild, against James McKeon, in the supreme court for the city and county of New York, and also certified copy of the affidavit of Benjamin F. Einstein, taken in the same case. These affidavits were taken and filed in said court in reference to a hearing upon a motion made in an action brought in said court by the defendants in this case against said James McKeon. These affidavits are respectively as follows:

"Supreme Court, City and County of New York.

"SIMON ROTHSCHILD and FRANK ROTHSCHILD, Plaintiffs,
against
"JAMES MCKEON, Defendant.

"CITY AND COUNTY OF NEW YORK, *ss:*

"Simon Rothschild, being duly sworn, says: I am one of the plaintiffs in this action. The defendant is indebted to my firm, the plaintiffs, in the sum of thirty-eight hundred and sixty-five $\frac{25}{100}$ dollars for goods sold and delivered by the plaintiffs to the defendant between the 18th day of July, 1895, and the 27th day of
37 October, 1895, no part of which has been paid, and that the said amount is owing to the plaintiffs by the defendants over and above all counter-claims or offsets, and that this action is brought to recover upon the said cause of action.

"I was present at the interview mentioned in the foregoing affidavit of Mr. Benjamin F. Einstein, and I have heard the said affidavit of Mr. Einstein read, and know the contents thereof, and the statement therein contained of what was said and done at that meeting by Mr. Einstein, Mr. Frank Rothschild, Jr., the defendant, and myself is in every particular true.

"I know that the goods which were delivered by the defendant to Frank Rothschild, Jr., (my son), in Springfield, and which have been attached by the sheriff in this action were not brought into this jurisdiction for the purpose of being attached. The plaintiffs never had any idea of commencing any kind of an action against the defendant, or of attaching his property, or of attaching his goods in question until the suggestion that such should be done was made by Mr. Einstein at that meeting, and was concurred in by the defendant.

"On the 27th day of December, 1895, sixteen of the forty-seven fur garments which were attached by the sheriff in this action were replevied by L. Cohen & Bros., who claim that they were the owners thereof, and the same were reclaimed by the said sheriff, the undertaking therefor having been furnished by the plaintiffs, and that the said undertaking has been duly approved and the said sixteen garments were returned to the said sheriff and are now held by him, and the action in which the said sixteen garments were replevied is still pending.

"S. ROTHSCHILD.

"Sworn to before me this — day of January, 1896.

"FRANCIS T. GRIBBINS,
"*Notary Public, Queens County.*

"Certificate filed in N. Y. Co."

38 "Supreme Court, City and County of New York.

"SIMON ROTHSCHILD and FRANK ROTHSCHILD, Plaintiffs,
against
"JAMES MCKEON, Defendant.

"CITY AND COUNTY OF NEW YORK, *ss:*

"Benjamin F. Einstein, being duly sworn, says: I am an attorney and counselor-at-law, a member of the firm of Einstein & Townsend, and of the attorneys for the plaintiffs in this action.

"On Sunday, December 22d last, I was present at a meeting in the room of Frank Rothschild, Jr., between the said Frank Rothschild, Jr., the defendant in this action, Mr. Charles C. Spellman, and Simon Rothschild, one of the plaintiffs herein. I attended that meeting as the adviser of the plaintiffs. Mr. Frank Rothschild, Jr., stated to me in the presence and hearing of the defendant that the defendant, who was engaged in the retail business in Springfield, Massachusetts, was financially embarrassed, that he owed the plaintiffs about four thousand dollars, and that he had delivered to the plaintiffs, through the said Frank Rothschild, Jr., a number of fur garments as security for the indebtedness, and to secure any moneys that the plaintiffs may advance to obtain a compromise for the defendant with his creditors.

"Mr. Frank Rothschild, Jr., further stated that the defendant was desirous of procuring a settlement or compromise.

"I asked the defendant what his assets and liabilities were and also how much he expected to pay his creditors. The defendant gave me a statement of his assets and his liabilities, and said that he thought he was able to pay, and could get a settlement for about twenty-five cents on the dollar.

"In making further inquiry as to the goods that had been delivered to the plaintiffs as security as aforesaid, I discovered that the goods were delivered by the defendant to the said Frank Rothschild, Jr., in Springfield, and that the defendant had delivered to the said Frank Rothschild, Jr., a bill or list of the goods, and that such bill or list was receipted. I then advised the plaintiffs in the presence and hearing of the defendant that the transaction had the appearance of a sale, while according to the statement of Frank Rothschild, Jr., and of the defendant, the goods were delivered as security only, and I further advised that the transaction ought to be made to appear precisely as it was, and that the receipt should be torn from the bill, as the goods had not been paid for and that the bill should be marked so as to show that the goods were consigned and
39 not sold. Thereupon the defendant himself tore from the bill the receipt and wrote on the bill the word abbreviation 'Memo.' to indicate that the goods were on memorandum or consignment, and the defendant said that he would write to his bookkeeper that night and have the entry in his books made to conform with the bill by writing in the word 'Memo.'

"The defendant and the others present discussed not only the feasibility of obtaining a settlement for the defendant, but also the

manner in which it should be undertaken, and it was finally determined by all present, upon the suggestion of the defendant, that he should himself visit his creditors on the following day and explain to them his condition and endeavor to get a settlement at twenty-five cents on the dollar. Mr. Simon Rothschild said that if it was necessary to accomplish the settlement either to part pay in cash, or to pay in cash such small claims as could not be included in the settlement, that the plaintiffs would advance the money necessary for that purpose.

"I advised Mr. Simon Rothschild in the presence and hearing of the defendant that the plaintiffs would be better secured by an attachment levied upon the goods in their possession, and which had been delivered to them by the defendant as aforesaid, than they were by simply holding them as security, and it was agreed between the defendant, Mr. Simon Rothschild, and myself that an attachment should be obtained on the following day, and that the sheriff should levy upon the goods in question, and that the defendant should go to the place of business of the plaintiffs to be served by the sheriff with a summons, and Mr. Frank Rothschild, Jr., then and there, in the presence and with the knowledge of the defendant, delivered to me a copy of the plaintiffs' account against the defendant, for the purposes of preparing the papers to commence the action and to obtain the attachment.

"In pursuance of the aforesaid agreement and arrangement the plaintiffs' attorney on the following day commenced this action to obtain an attachment therein and directed the sheriff to go to the place of business of the defendant which, according to the annexed affidavit of assistant to the deputy sheriff Dunphy, was done.

"From the statements that were made to me by Mr. Frank Rothschild, Jr., by the defendant and Mr. Spellman who acted as attorney for the plaintiffs in Springfield, and by the arrangement for the commencement of this action and obtaining and procuring the said attachment, which was entirely my suggestion, I am sure that the said Frank Rothschild, Jr., did not induce the defendant to deliver to him the goods in question to have them brought within the jurisdiction of this court and attached, and I am further sure that the plaintiffs had no idea of commencing any kind of an action against his property until I suggested it, and the suggestion was made by me in absolute good faith toward the defendant, and also because I believed, and still believe, that the plaintiffs would be in better position if they sold the goods in question under judicial process than otherwise.

"B. F. EINSTEIN.

"Sworn to before me this — day of January, 1896.

"FRANCIS T. GRIBBINS,

"*Notary Public, Queens County.*

"Certificate filed in New York Co."

The defendants duly excepted to the admission of these affidavits in evidence.

The plaintiff called FRANK ROTHSCHILD, JR., who testified as follows: "I live in New York city, have lived there about thirty years. I am the son of one of the defendants in this case and nephew of the other. The firm of Simon Rothschild & Bro. is composed of Simon and Frank Rothschild, my father and uncle. The firm of S. F. & A. Rothschild is composed of sons of my uncle, who are my cousins. The firm of Abrahams & Straus is composed of Mr. Abrahams, Mr. Isadore Straus, Isaac Straus, Nathan Straus, and S. F. Rothschild, an uncle of mine. The S. F. Rothschild of S. F. Rothschild & Bro. is the S. F. Rothschild of Abrahams & Straus. Mr. Rothschild is married into the Abrahams family. I am employed by Simon Rothschild & Bro. I have been since 1873, in the capacity of office man, corresponding agent, and supervisor of business. I sometimes sell and bill goods. I am credit man, collector, and correspondent. I go to Europe for them, have been to Europe for them quite frequently. I am general agent of that firm, with full power and authority to act for them according to my judgment. It is a large firm. Their warehouses and stores are at 428, 430, 432 Broadway, corner of Howard street. As credit man it was my duty to issue credits. I mean by that when a bill was bought to pass upon the worthiness of the party who bought. The extending the time of credit or enforcing the payment of a bill at maturity rested with me, and to a very great degree the entire direction of collections rested upon my final decision. I did not occupy a similar position in regard to my cousins' firm, S. F. & A. Rothschild. I knew James McKeon, had known him for five or six years. I knew him passably, enough to extend a very good line of credit, not enough to be in good social relations with him. I didn't entertain him when he went to New York. I was in the habit of calling him by his first name and he by mine. His business was retail-clothing dealer in Springfield. My firm didn't deal in furs. We made cloaks of cloth. Mr. McKeon was indebted to my firm on the 20th day of December, 1895, approximating $4,000. $3,865 is the exact amount. It was slightly overdue, no part considerably overdue. These particular bills were sold in October or November. The time
41 that we extended to him was thirty days with a dating. That is, goods that might be shipped in October, the date was from November 15th or some specific date. I had had correspondence with McKeon, and also had seen him in the store and spoke to him about this bill. I had not been able to collect it. I had endeavored to collect it and asked him to remit. He did not, but promised to do so. I requested him to remit a number of times and he had failed to do so. S. F. & A. Rothschild had a claim against him at that time. I think it was somewhere in the neighborhood of $2,000. I couldn't specify definitely without a statement. I do not know whether that bill was overdue. I am not familiar with their affairs whatsoever. That bill was placed in my hands. When I came up to Springfield I brought it with me to use my judgment in the matter. I certainly wouldn't be so flat as to refuse the money that was offered to me. I do not mean by using my judgment I was to use my judgment whether I would enforce

the collection by vigorous means. When I left New York I had no intentions whatsoever, as to what steps should be taken to get that collected. I understood that it was left to my judgment as to the steps that should be taken to get that collected.

"I came to Springfield, I think it was on Thursday. It was the day before I got those goods. I did not come here because I was a little worried about his ability to pay the bills. I came here because Mr. McKeon hadn't remitted and promised that he would. Before I came I did not infer that he was in financial trouble. I formed the conclusion that he had reasons for not making any payment. I inferred that he was in financial trouble, and on December 19th, 1895, I went to Springfield, Massachusetts. I had in my possession six thousand dollars of indebtedness against McKeon. I sought for him. I did not find him on that day. I should say I called there some eight or ten times, and I was told each time that he was not in. I retained counsel, Mr. Spellman. I think I called on him in the afternoon, about half past four or five o'clock. I retained him for legal advice concerning Mr. McKeon not being at his store, to get a recognition, not to bring any suits against him, but for any services that I might require of him. I couldn't say I put in his hands for collection the claim of S. F. & A. Rothschild on that day. I am almost positive that I did not. I was not aware that on the very 19th day of December, 1895, the claim of S. F. & A. Rothschild was sued by a writ made out by Mr. C. C. Spellman. I didn't know anything about it, but, if it was sued, undoubtedly the claim came to Mr. Spellman's hands from me. " I don't know whether, as a matter of fact, Mr. Spellman also made out a writ against Mr. McKeon in the name of Simon Rothschild & Bro. I saw Mr. McKeon the next morning at the Haynes house. When I first saw him Mr. Spellman and myself were present. I said to him that I had been looking for him, and he had better come upstairs to my room where
42 we could talk privately. He said that if he had known it was I who had called so frequently the day before, he wouldn't have kept himself out of sight. That is what he told me in the hallway and office of the Haynes hotel, when I first saw him. We went upstairs. Mr. Spellman was with us. Well, I said to him, 'Jim, what is the matter?' He said, 'I am very sorry, Frank, that I haven't been able to remit to you as I promised;' he says, 'Business has been so dull, the weather has been warm, and I can't pay my bills as promptly as I would like.' I said, 'Well, I am very sorry to hear this.' Up to that particular time, I had not asked him to pay the bill. I did not ask him to pay the bill of S. F. & A. Rothschild. He said, Business has been dull, the weather has been warm, and he had bought more goods of us than he could pay for just at that time, and he said he had been to see Mr. Lathrop to get advice from him, and Mr. Lathrop had told him to go to the store and get figures as to his assets and liabilities, and Mr. Spellman suggested that we send for Mr. Lathrop, who eventually came. I told Mr. Lathrop, or Mr. McKeon, the gentlemen present, I said that I felt very sorry that Mr. McKeon was in this embarrassed condition, and was willing to help him. I said, of course one of the conditions

would be that he would pay our claim in full. Mr. Lathrop then said that that would be creating a preference, and the laws of Massachusetts did not permit anything like that, and I said to him, 'Well, this won't be a preference, for he will give me merchandise which I can take to New York and realize on. It may need some cash to effect a settlement, and we will let him have it.' He said he didn't know what kind of merchandise he could give me, that he didn't want to take too many goods from his stock, and he thought that some valuable furs would answer the purpose, and, of course the conversation then turned as to how he would give me the furs, and he went away. We had arranged to meet at the depot, there to take a train, I think, somewhere around 2.30, and I met him there, and he gave me three checks for some trunks filled with furs. They were baggage checks, trunk checks. When we were in the room he said—the way I got the impression that he was financially worried—he said there was a claim in the hands of Mr. Carpenter an attorney of this city, who represented a cloak-house in New York, and he didn't know what Mr. Carpenter might do. I said, 'Well, I will advance a little money. I have here a check of about a hundred dollars, which I will give you, and you can pay Mr Carpenter on account.' And I gave him the check, and eventually, as I said before, we met at the depot, and he gave me these trunk checks, and he handed me a list of the fur garments, and he says, 'Of course,' he says, 'this is done hurriedly. I don't want to deplete my
43 stock completely,' and, he says, 'I guess I had better mark this bill paid, in case anybody has been watching the store,' and this and that, and presently the train came along, and I went to New York."

The statement or bill was produced and offered in evidence.

"It didn't then have the word 'Memo.,' and it did have at the bottom here a statement that it was paid, and signed by James McKeon. I supposed the furs would be packed in trunks. I think he spoke of their being packed in trunks, because you couldn't check them in cases. I wanted them checked so as to take them with me. I think the lawyer spoke about attaching his store. Mr. Spellman and Mr. Lathrop spoke about that. I think that the lawyers decided that that would be done very quickly after I got these goods away from the store. I communicated with my people in New York by telegraph, that I would leave here on such and such a train. I should say I reached New York round six or half past six or thereabouts, half past five. My father and my cousin met me in New York, one of S. F. & A. Rothschild and my father of Simon Rothschild & Bro., the partner of S. F. & A. Rothschild is in the employ of my firm. His name is Maurice, another cousin of mine. Maurice Rothschild and my father met me. Our truckman was there with a truck and a driver. I gave the checks to one of the porters. My firm got the goods, they were taken to our place of business on Broadway that night, left in the storehouse over night. The next day they were taken over to Brooklyn, to the storehouse of Abrahams & Straus, because in the first place, Abrahams & Straus have a very able

buyer of furs, a gentleman very well known amongst the fur-houses of New York, and we wanted the goods estimated, as to the value of them, and another thing I was a little bit afraid there might be an attachment or replevin. I don't know whether the tags were removed from those garments. I didn't see them myself. I didn't remove them. You have them here, I suppose they must have been removed. These goods were appraised at Abrahams & Straus's by the buyer of Abrahams & Straus, in connection with Maurice Rothschild, who went over to check them off at quite a time later. The buyer of Abrahams & Straus appraised these goods at the house of Simon Rothschild & Bro. These goods were attached by Simon Rothschild & Bro., and were sold by order of the sheriff. We bought them, that is, Simon Rothschild & Bro. bought them, at the sheriff's sale. We bought each garment as it was offered, and sold them again to Abrahams & Straus. They may now have them for all that I know. I was not at the store in Springfield when these goods were packed. I didn't go there because I didn't want to. There was no occasion for me to go in and pack furs or to see them packed.

44 I didn't say I was getting secured for my four thousand dollars. I didn't say that this property was given to me to secure my claim in full. You didn't ask me any such question. I was not getting security for my claim. I told you a moment ago that the attorneys told me that such a thing was not possible in this State. I mean to tell you exactly what I said before. Mr. McKeon couldn't have given those goods as a security for my claim. I have told you what I did do. I took these goods only partly as security for my claim, if there was any surplus. I advanced nothing on these goods. No money has been advanced since, have had no opportunity to advance it. I have never returned the money to the assignee. I offered to a little while ago in New York city."

The witness was asked as follows:

Q. Well, now, let us see, you are one of those gentlemen who signed an affidavit in some of these proceedings?

A. Many proceedings I have.

Q. Have you ever said that you took this money as security of the payment of your claim? Have you?

A. If you will define the word "claim."

Q. Don't you know what the word "claim" is?

A. Yes, sir; I know the word according to the dictionary, but not a legal matter, just now, as there is more than one point involved in this word "claim."

Q. Now, then, let me ask you if, on the 8th day of January, 1896, you didn't say this: "I told him," meaning McKeon, "that I would assist him all I could in obtaining a settlement and that the plaintiffs would advance some cash for that purpose, if it becomes necessary, provided he would secure the claim of the plaintiffs and also secure whatever moneys were advanced by plaintiffs to effect the settlement"?

A. Yes, sir.

Q. Now, then, that was on the 8th day of January, I believe, you signed and swore to that statement?

A. Is that date correct?

Q. I should presume that it was correct, and it was true, was it not?

A. Well, it is quite natural supposition that it is true.

Q. Now, then, we were over in New York and took your deposition on the 9th day of January of this year?

A. Is it dated that day?

Q. If it is dated so?

A. Yes, sir.

Q. Did you say at that time that the goods were given to you—in answer to a question—that the goods which were given you were given to secure the claim, were they, and your answer, "And any cash that might be advanced," did you say that?

A. Is the answer there?

45 Q. Primarily to secure your claim, then past due, wasn't it?

A. Not primarily to secure that claim, no, sir.

Q. Well, you hadn't advanced any money?

A. No, sir.

Q. You didn't know how much money you would advance?

A. No, sir.

Q. You didn't know as you would advance any?

A. Yes, sir, whatever should become necessary.

Q. You had no idea how much it would be?

A. No, sir.

Q. You didn't know how much your claim was?

A. Yes, sir.

Q. Then I assume the loan was meant primarily to secure that claim?

A. I couldn't tell you.

Q. He could tell you that?

A. Yes, sir, I testified to that. Yes, sir, I was willing at any time to advance money up to ten thousand dollars to effect a settlement. I don't know what he said to his creditors. He might have asked some of them for extension. Some of them were to be paid in full. I don't know who. According to the evidence that you read off before. A proposition was made from my attorney in New York city, that is, my attorney so informed me, that he offered to pay this money back to the assignee. It was made indirectly. I said something to the assignee. I *I* don't know directly whether it was made or not unless you pass an imputation upon the truthfulness of my attorney in New York. I will swear a dozen times that my attorney told me he had made that proposition to Mr. Knight.

Q. Didn't you say to the assignee, in New York, that if he would drop these proceedings, you would give him five or six hundred dollars that he could put in his pocket and nothing ever be said about it?

A. No, sir.

Q. Now, I don't want any play between us upon words. Was there anything in substance said that would justify such a question?

A. I have no right to tell you what I think about your question. I answer you as a gentleman, No, emphatically.

Q. I ask you if in any form of words you offered to Mr. Knight for his own use any sum of money if he would dispose of this suit?

A. No, sir.

On cross-examination he testified:

"I came up here to look after the matter of a claim of my firm upon this man, McKeon. I knew nothing about his financial affairs at that time. He was in very good credit. I had been trading with him some five or six years. I saw him on the morning of the 20th of December at my room in the Haynes house. His store was underneath the same building. He said he felt very sorry, that
46 he was afraid he would loose his business if any of the creditors interfered with him, and he began to cry, and I told him I was perfectly willing to help him. He said he had been to see his lawyer, Mr. Lathrop, and Mr. Lathrop told him he could not give him any advice till he had figures. He did not say anything to me as to the amount of assets he had. He thought his assets and liabilities were about equal. He told me he owed about twenty-eight thousand dollars, as far as I remember. He was perfectly heartbroken to think that his business would be taken from him. He said he had always made money there and he wanted to continue. He said he had always made money an he didn't want to lose his business. He said he had made money every year. I inferred from his manner of paying and his standing among the cloakhouses that he was in very good credit, and doing a profitable business. I told him before, and then I told him in Mr. Lathrop's presence, also, that I was going to help him, but as a condition of my assistance I wanted to be secured in my claim. McKeon sent for Mr. Lathrop upon our suggestion. We didn't want to take any steps without his having a legal adviser. Undoubtedly my purpose was so that anything he did would be done properly. I came here without any evil motives whatsoever. When Mr. Lathrop came in I said something to Mr. Lathrop about my willingness to help him; as to the amount of assistance he would need, I told him whatever was necessary. I said to Mr. Lathrop, as a part of the conversation, that I was ready to assist him, but that as a condition of it I would want to be secured in my claim, and also for what advances I made, and then Mr. Lathrop told me that that couldn't be done. Mr. Spellman said it couldn't be done. Then Mr. McKeon said he couldn't do it. As far as I remember, Lathrop told me that the laws of Massachusetts were different from those in New York State, that a preference could not be created here.

"There was quite a voluminous lot of other conversation, and a great deal said. There was no further discussion of the security of my claim. When we were talking about claims, I had partly understood that the word claim referred to the advances I might make. I said to McKeon when Mr. Lathrop was there that it would be necessary for him to have cash, and the best way for him to get this cash quickly would be to take some of his goods to New York, where

there was a better market than there was in Springfield, and where I thought I could turn them into cash, and he would have the benefit of it, and I would get him on his feet in a week or two. Mr. McKeon expressed the same feeling. He felt very grateful to me. The reason I got the goods was that if I was not able to turn those goods into cash, that I would be ready and glad to advance cash on the security of those goods for the advances. I told him that. I explained about paying my preceding debt as far as I can recall. You know we are quite large dealers in New York, and naturally have many large accounts through the United States, and this being quite a considerable amount, I
47 had it in my head when I offered to assist Mr. McKeon that not alone could I make a valuable account with him by helping him go on in business. I explained that in the room there, yes, sir, but I could take chances on being recompensed later. Mr. McKeon said that what cramped him first was the fact of his having bought furs, and the weather was so unseasonable, and trade had been so dull in that class of garments, and that led up to that one particular suggestion, that he would give me the furs to take to New York, to raise money for him. He had stock there that was unmovable, that was unsalable at that particular time. He did not give any particulars what he would put in the trunks. It was left entirely to him to decide what should be done.

"After this conversation which I had with Mr. Lathrop, and where I first said I wanted to be secured for my claim, and then Mr. Lathrop explained that that could not be done, I said to Mr. Lathrop and to Mr. McKeon that it wasn't going to be a matter of preference at all, but I was going to do it to help out Mr. McKeon, and that I would head the list of compromise creditors. The idea of taking these goods was to secure me, primarily, in bringing about a settlement for the benefit of Mr. McKeon and for any advances that I might be called upon to make, and so he could go on in business. Mr. McKeon was very glad that I had offered my assistance to him. He had not the least doubt but that he would be able to pull through. It was in New York that something was said as to the amount which would be likely to be offered for settlement. That matter was discussed in New York. I had nothing whatever to do with the selection of the goods or any of the details or arrangements of packing them up. I knew nothing absolutely about it. The first I knew about the method was when I went to the depot just before the train was going and found the trunks and Mr. McKeon there. I think Mr. Lathrop left a little bit before Mr. McKeon. Nothing was said between me and Mr. McKeon about the subject of getting these goods to take to New York except that he said that he would go and pack them in trunks and meet me at the depot. With reference to the attachment made by the other Rothschild firm, I had nothing to do with making that attachment. That was decided by the lawyers. Mr. Lathrop was very friendly disposed toward Mr. McKeon. He was Mr. McKeon's attorney, and when I offered to lend this money to help Mr. McKeon along, Mr. Lathrop turned to him and said, 'Mr. McKeon, can you trust Mr. Rothschild? It is a

very good proposition. Can you trust him?' And Mr. McKeon says, 'Why, yes, I have known Frank for years, and he represents a high-minded firm in New York, and he has helped me, and I am perfectly satisfied it will be a very good thing if this thing can go through.' And that led up to the agreement between the lawyers as far as I know.

48 "That conversation took place after the explanation about the preference. When I had said that I would make advances and that those goods could be taken to secure the advances I made then, Mr. Lathrop approved of the plan, and said to Mr. McKeon it would be a good thing to do if I could be trusted. I think Lathrop's only object in suggesting this attachment was to protect Mr. McKeon. I had absolutely nothing to do with it. I didn't instruct Mr. Spellman. Whatever they did, they did by consultation and agreement between themselves. Nothing was said as to what value should be sent me, by Mr. McKeon or Mr. Lathrop or anybody. The subject was not even alluded to. My father is about seventy years of age. We didn't want to leave a valuable grade of furs at the depot over night on account of the insurance, so we took them to our storehouse. The goods were not mingled with goods belonging to us or to Abrahams & Straus. They were attached and sold at sheriff's sale. They were taken out of the trunk and immediately put back in the same trunk, and the keys remained in the possession of my cousin Maurice. It was intimated to us that they would be replevined; indirectly, they were to be replevined by creditors in New York, and I didn't want that done. They were subsequently replevined by a party who had sold the furs, Cohen & Bro. I was present at the sheriff's sale. There were about seventy-five people present. The goods were sold singly. They were bid upon. I bought them all, that is, my firm bought them. I have only seen Mr. McKeon once since that time. I don't know where he is now. I think I saw him about round Christmas, 1895. I don't recall that I saw him in January. I have never seen him since. These goods were attached in New York at the suggestion of our attorney there. At that time Mr. McKeon had visited his creditors and told me that he had not succeeded in getting their signatures. I think the attachment was made about four o'clock in the afternoon. I don't know how many of his creditors he had seen. We had determined on Sunday, the attorney advised we had better attach the goods on Monday. Mr. McKeon first saw creditors on Monday. We were partly making the attachment for the purpose of preventing other people from making attachments on the goods, and later on the attachment suit was prosecuted to the end. There were two other parties tried to attach. Mr. McKeon first went to see the creditors, Mr. McKeon personally, and he came into the store and told me that he received a very different reception in calling on them with that intent from what he did when he was buying goods, and he was going back home. And I was not called upon to advance any money. I do not know that that was the end of any attempt at compromise. I think there was a subsequent attempt made. I advanced one hundred dollars here in Springfield before

I went away. That was to give to Mr. Carpenter, an att
some one who was pressing a claim against him. T
49 not been paid back. I spent a very few minutes at t
I don't think it was five minutes. I had no oppor
examine this bill. He gave it to me and said I had better
paid, and the train came along. It was all done in a fla
McKeon didn't dispute the transaction at all."

On redirect examination he testified:

"I don't know that Mr. Lathrop had to approve of taki
goods from Springfield. Lathrop said it would be a ve
thing for Mr. McKeon if that plan could be carried thr
don't know that Mr. McKeon got Mr. Lathrop's permissi
Lathrop offered no objection to my taking these goods. Mr.
approved of the plan. I don't know whether he approve
taking those goods. I want the jury to understand that ev
was done with legal advice. It was not done contrary to
vice. I want to convey to the jury that Mr. Lathrop had
tion to the plan. Taking these goods was a part of the
want the jury to understand that Mr. Lathrop didn't disap
taking those goods."

On recross-examination he testified:

"Whatever affidavit I made in New York was prepared
sel, and was supposed to be an entire, complete article.
tained everything that was necessary in that particular
think it did not undertake to narrate all the conversation
Springfield."

The affidavit of this witness in the case of Simon Rothsc
Frank Rothschild against James McKeon in the supreme
the city and county of New York was offered in evidence
admitted against the defendants' objection, and the defenda
excepted. No objection was made that the occasion of t
ments was not sufficiently designated.

"Supreme Court, City and County of New York.

"SIMON ROTHSCHILD and FRANK ROTHSCHILD, Plaintiff
against
"JAMES MCKEON, Defendant.

"CITY AND COUNTY OF NEW YORK, *ss:*

"Frank Rothschild, Jr., being duly sworn, says: I am
of the plaintiffs in this action, nor am I a member of the
S. Rothschild & Bro., the plaintiffs. I am connected with t
as credit man, and am the son of the plaintiff, Simon Ro
I have read the affidavit of the defendant, verified Decer
1895, and also the affidavit of Edward H. Lathrop
50 on the same day; and such statements contained
affidavits as are inconsistent with those contained
affidavit, are not true.

"The defendant was, on December 20, 1895, indebted to the firm of S. Rothschild and Bro., in the sum of $3,865.25 for goods sold and delivered by that firm to the defendant between the 18th day of July, 1895, and the 27th day of November, 1895. Prior to the 20th day of December, 1895, plaintiffs had repeatedly requested remittances on account of this indebtedness, and had been unable to receive any payment on account, and from the excuses that the defendant gave for not making any payment I inferred that he was in financial trouble, and on December 19, 1895, I went to Springfield, Massachusetts, where the defendant lived and carried on his business. I arrived at Springfield in the afternoon about one o'clock. I called a number of times during that afternoon at the store of the defendant, but was unable to see him. I was told by one of his employees that he had gone to lunch, and at another time I was told that he had possibly gone out of the city. I then sent a note to his residence. The messenger returned with the answer that the defendant was not at home and that Mrs. McKeon, his wife, was out of the city. I thereupon consulted Mr. C. C. Spellman, an attorney, in Springfield. Mr. Spellman called the same afternoon at the defendant's store, and with the same result. On the following day, December 20th, 1895, about nine o'clock in the morning, Mr. McKeon called upon me at my room in the Haynes house with Mr. Spellman. Mr. McKeon said to me, 'Why, Frank, did you not let me know that it was you that called so often on me yesterday?' The defendant then told me that he was financially embarrassed, and that some of his creditors were pressing him, and that he had been in consultation with his attorney, Mr. Lathrop, that morning. Mr. Spellman suggested sending for Mr. Lathrop at once, which was done. Mr. Lathrop came in about ten o'clock in the morning. I told Mr. Lathrop that Mr. McKeon had told me of his financial condition, and I asked what Mr. McKeon intended to do. Mr. McKeon replied that if he were put into insolvency everything would be lost to himself and his creditors would get little or nothing, and that he wanted to make a settlement with his creditors. I told him that I would assist him all I could in obtaining a settlement, and that the plaintiffs would advance some cash for that purpose, if it became necessary, provided he would secure the said claim of the plaintiffs, and also secure whatever moneys were advanced by the plaintiffs to effect the settlement. It was stated by the defendant and myself that in making a compromise, some creditors for small amounts would refuse to settle and would have to be paid in full, and that some money was necessary to pay them. It was for that purpose that I suggested that the plaintiffs would advance some cash. Mr. Lathrop said, 'That seems fair;' and both he and the defendant agreed to that course, and
51 the defendant said that he would at once deliver to me sufficient merchandise to secure the plaintiffs. The defendant informed us at that meeting that Mr. Carpenter, an attorney in Springfield, then had a claim in his hands for collection against him amounting to about $600.00, and he was afraid that Mr. Carpenter would put in a keeper, or, in other words, attach his stock,

and it was necessary for him (the defendant) to act promptly in delivering to me the said merchandise. Mr. Lathrop (Mr. McKeon's attorney) suggested to Mr. Spellman the advisability of at once putting in a keeper for S. F. & A. Rothschild, so as to obtain priority over any keeper or attachment that might be put in or obtained by Mr. Carpenter. The defendant thereupon went to his store and packed the furs which have been attached in this action, in trunks. The defendant bought the trunks for that purpose himself, and had them brought to the railroad depot and delivered them to me, and Mr. Spellman then put in a keeper for S. F. & A. Rothschild. At the railroad station I asked the defendant to mail me a list of the goods that he had packed in the trunks, and he said that he had made out such a list in the form of a bill, and said, 'I guess I'll mark it (the bill) paid, in case Carpenter or any other lawyer should come to the depot and stop them,' as he said he was afraid his store was being watched."

The foregoing is the whole of said affidavit, and the same was duly signed and sworn to.

The plaintiff offered a portion of a deposition of the witness FRANK ROTHSCHILD, JR., taken in this case in New York on June 9th, 1897, by stipulation of counsel, as follows:

Q. Now, will you state fully what conversation was had there between you and Mr. McKeon and Mr. Spellman?

A. Yes. Mr. McKeon said that he didn't know I was in the city, otherwise he would not have kept himself out of sight. I cannot tell you the exact words he used. That he had been to see his lawyer, Mr. Lathrop; had found himself financially hard up, and been to see Mr. Lathrop. And then Mr. Spellman suggested that he send for Mr. Lathrop; and Mr. Lathrop eventually came. We were then in the room, Mr. McKeon, Mr. Lathrop, Mr. Spellman, and myself, and Mr. McKeon said there was some creditor, Mr. Plaut, who had placed a claim against him in the hands of an attorney, Mr. Carpenter, and that he had paid part of it to Mr. Carpenter, and promised to give him some more, and that a day or two previous—three or four days previous—he had taken up a note of about $2,500. Either $2,500 or $3,500—which he had given for a loan. I think it was to the First National Bank of Springfield, anyhow, some bank up there that he did business with. And he said he didn't want to be closed up; that if he were declared insolvent, he would lose everything; that he had been doing a good business and making money; that trade had been dull and he was not able to take
52 care of his accounts as they matured; that he was sorry that he had not been able to pay my firm as promised. I suggested to him then, I said, "I am perfectly willing to assist you in going on in business, and will lend you money for that purpose, advance cash to you," I said, "but one of the conditions would be that you give me collateral to secure my claim, and also to secure whatever cash we might lend you, my firm might lend you;" and he said, the only kind of collateral he could give me might be some merchandise, some valuable furs; and Mr. Lathrop said to him,

"Mr. Rothschild's proposition sounds very fair and beneficial; and if you think that you can trust Mr. Rothschild, I do not see any objection to your doing so." And it was then agreed that he was to go to his store, pack some furs and meet me at the depot.

The plaintiff, ROBERT A. KNIGHT, was recalled and testified as follows:

"Since this suit was begun I met Mr. Frank Rothschild, Jr., in New York, at the office of Simon Rothschild & Bro. I went there to find Louis Rothschild, who was connected with the S. F. & A. Rothschild firm."

Against the objection of the defendant, the witness testified to the conversation, as follows:

"I met Mr. Frank Rothschild, Jr., near the entrance of their office, and he invited me into his private office, having ascertained who I was, and began a conversation with reference to this case. He then took from his desk a block of paper, on which he made a computation of a dividend of fifteen per cent. which had been paid on the claims of creditors, amounting to $580.00, or such a matter, and at that time he stated to me, he said, 'You don't care to press his suit, you don't care to bother with it, there is no object in your proceedings any further. What do you say to dropping the suit, and you may have the dividend which would come to me, and you can put it in your pocket, or do what you wish to with it?' I think he added further than that that no one need know anything about it. I don't think he cautioned me not to say anything, but I am quite positive that he added, 'No one need know anything about it,' or words to that effect."

To the admission of the evidence of this conversation the defendants duly excepted.

On cross-examination, the witness testified:

"To use my exact expression, I said, 'What do you take me for?' and then I replied that I didn't propose to do anything of the kind. I don't think I made any further reply to that. We talked a little about the case in a general way. I did not go to lunch with him; he invited me to. I have never been to lunch with him. I don't think I said anything further than what I have stated. I testified that he said to me that no one need know anything about it. That is what he said. I am very positive about it. I am as positive as I
53 was a moment ago. I think I was positive a moment ago. I think I said I was very sure that he said so. I think my statement was that I was very sure that he said so. That is my impression, that I said I was very sure. I didn't intend to put it reluctantly at all. I don't consider that I put it reluctantly. I don't understand that I said, 'I think that he did, I am not quite sure.' I don't know that I can give the cause of my saying, 'I am quite positive.' It is what I believe to be true, believe to be the fact. I said I didn't know as I could give the cause for that second, but I said what I believed to be the fact, to be the truth. The very

first talk we had was near the outside, or the entrance from the outside, and he had ascertained who I was. He came up and spoke with me, and invited me into his private office. Having got in there, something was said about the case, and he remarked in practically this language, 'You have no object, or reason, for pressing this case, you have paid a dividend of fifteen per cent. to the creditors who have proven claims. Such dividend upon our claim of four thousand dollars, or nearly that, would amount to about five hundred and eighty dollars. You can retain our dividend of five hundred and eighty dollars, and discontinue this, and drop this suit. You can put it in your pocket, or you can do what you see fit with it.' I saw no stenographer present. As a matter of fact, I think there was a stenographer there a short distance off. This conversation wasn't carried on in any louder tone than ordinary. The stenographer, as I recall it, or a lady, I presume she was a stenographer, was in the other room, which was but a short distance from where we were sitting at his desk. I had my back to the young lady, and Mr. Rothschild was facing me. I didn't consider the offer to me as an offer of compromise of this case, at all."

The plaintiff also testified, "At no time since I have been assignee has there been any offer to return these goods or pay for them."

On cross-examination he said:

"I had that conversation with Mr. Frank Rothschild in New York in the early part of October, 1896. It was the first time I had ever met him. I shouldn't have known the day of the month, but in looking over my memoranda I think it was the 12th. I refreshed my recollection. The 12th of October. It was on that day or very near it. I have a memoranda that shows I was in New York on that day. I can't say whether I arrived there on the day before. I think I must have done so, because this was about 2.30 in the afternoon, and I came back on the four o'clock train from New York. I don't think I was in there over fifteen or twenty minutes. There was some conversation relative to the case before that conversation took place. I think he invited me to lunch, and he also invited me to stop in the next time I was down. I don't think I de-
54 clined to go to dinner for the reason that I had been out and dined the night before. I don't think that was the reason at all. I most positively say that is not the reason I declined to go to dinner. I probably had dined the night before. I don't know what you mean by being out to dine. I don't think I dined at the club. I probably dined at some hotel. I couldn't tell now. The reason I gave for declining was because I was going back at four o'clock. I don't think I gave as another reason that I had been out to dinner the night before. I am very positive I didn't. I don't think I expressed any particular indignation further than I said. I didn't feel particularly wounded. I don't think I gave it very much thought. I have seen Rothschild at the office of Mr. Einstein several times. He has treated me courteously, and I have so treated

him. The other day I said I was going to invite him to the club. It was suggested to me that I should."

FRANK ROTHSCHILD, JR., was recalled by the defendants, and testified as follows: "When McKeon was in New York, within a few days after this transa-tion, and -aid he would settle with his creditors, I told him that I would discontinue legal proceedings, if that stood in the way of a compromise, and we offered to release the goods."

On cross-examination by the plaintiff he testified:

"The goods I offered to be released were those that had been attached. I made the offer by verbal word. I gave him a letter afterwards. I have not the letter. I think there is a copy somewhere.

Q. Was this (showing) it? 'New York, December 23, 1895. Dear sir: In case of composition of creditors by James McKeon is effected within fifteen days from date, we herewith agree to discontinue all legal proceedings and remove the keeper now in possession of his store in Springfield, Mass. Very respectfully yours, S. Rothschild & Brother.'

A. That sounds like it."

The witness continued his testimony as follows: "I have no doubt about it. That letter represents what it recites. I think I have stated what I said to Mr. McKeon. I will repeat it. We were perfectly willing to release those goods in case he could effect a compromise. I wasn't familiar with his affairs. I didn't see Mr. McKeon after. He did not effect any compromise with any single creditor to my knowledge. I don't know what he did. I don't know what he said to his creditors. I can't tell you anything. I don't know. It isn't any of my business. I do not know of a single creditor that he compromised with."

The plaintiff called JOHN ARNOLD, who testified as follows: "I live on Gardner street. I am 19 years old. I was a clerk for Mr. McKeon about five years. I was with him at the time in December, 1895, when the furs were sent over to New York, three
55 trunks full. I remember the facts of their being sent. I packed them, or helped pack them. I was quite familiar with those furs while they were in the custody of McKeon. I know where those furs had been kept in the store after they were received. They were kept in the two last cabinets in the back part of the store. The cabinets had a cloth covering in front. They were made like a book-case with cloth covering in front, and the furs were under it on wooden hangers. I assisted in packing those furs. Possibly one or two of those garments were garments that had come down from the last season. I know the general condition that those garments were in when they were received. It was first-class. I had been familiar with the garments during the time they were in the store. I certainly knew their condition the day they were sent

away. They were just about the same when they were sent away as they were the time when they were received. There was no material difference. They were packed between twelve and two o'clock. The store was the next door to the Haynes hotel. There was a store between in the front part, but in the rear the store reached round so it joined the Haynes hotel. There was a rear entrance to this store and a rear entrance to the Haynes house. Those three trunks were removed from the store part, being taken out of our basement, taken up the back way through the corridor of the Haynes house, and then they were taken by the Haynes truckman out of the front door of the house."

On cross-examination he testified:

"My duties at the store were to look after the stock. I see it is kept in first-class order, brushed up, and see that the goods are not torn and are kept clean. I was a boy, then, in the store. I had the key to the store. I cleaned it out in the morning and kept the goods in proper condition on the shelves, and saw that they were replaced where they belonged after they were handled over by customers or would-be purchasers. I sold goods. Everything we handled. I sold furs and furs of this class. I think I do know more about furs than a common everyday man. I saw these furs when they came in. I unpacked them. I was there in 1894. I don't know how many furs came in in 1894. I unpacked them. Mr. McKeon wanted me to look them over to see if they were in good condition. He asked me to. He didn't leave looking them over to me. He looked at them himself and others, and when I packed those goods I looked to see if they were in good condition. I am sure I looked at them to see if they were in good condition, because those were my orders from Mr. McKeon. Miss Deitz was present. I did not hear her say that she didn't look. I was in this room when she testified just now. I couldn't say where Chapman is. I last saw him a month ago. His duty in the store was
56 to look after the furs. He was a salesman. He took care of the store some. The goods were in good condition because we looked at them every morning and kept them so. I looked at them every day. I didn't look at them that morning, though. Mr. McKeon didn't tell me to examine them before they were put into the trunks. I don't know as I said so. It was our duty to examine them every morning. I didn't say before we put them in the trunks, though. I don't think I did. When I looked at them I certainly did that in the ordinary course of business, to see if everything looked neat and tidy about the store and not with particular reference to their condition anything more than anything else in the store."

McKeon did not appear as a witness, the testimony showing that neither party knew of his whereabouts.

Both parties presented considerable evidence relating to the value of the property in dispute.

Miss Deitz was the only witness on behalf of the plaintiff who testified as to the value of the entire lot of goods. The other witnesses for the plaintiff as to value testified only to the value of 38 garments, this being all the goods they had an opportunity to inspect. The value placed by such witnesses upon said 38 garments was $4,857.00.

The valuation placed upon the 47 garments by the witnesses for the defendant was about $3,000.00.

The amount realized from the sale of said 47 garments at auction by the sheriff in New York city was $2,982.00.

Upon this evidence the defendants asked the court to rule that there was no evidence to warrant the finding that McKeon intended to prefer the defendants or intended to prevent this property from coming into the possession of the assignee or from being distributed according to the laws relating to insolvency, and that the action could not be maintained. The court refused so to rule and the defendants duly excepted.

And the defendants being aggrieved by these rulings and refusals to rule, and having excepted thereto, after verdict against them, pray that their exceptions and their exceptions to the admission of testimony as hereinbefore stated, be allowed.

SPELLMAN & SPELLMAN,
Attorneys for Defendants.

Allowed.
CHAS. S. LILLEY,
Justice Superior Court.

57 And on the first day of December, in the year eighteen hundred and ninety-seven, said attorney, E. N. Hill, disappeared as attorney for the defendants, which disappearance is in the words as follows:

Disappearance.

COMMONWEALTH OF MASSACHUSETTS, *Hampden*, } *ss:*

Superior Court.

ROBERT A. KNIGHT, Assignee, }
vs.
ROTHSCHILD and Another. }

In the above-entitled cause I withdraw my appearance as counsel for the defendants, and desire that my withdrawal be noted on the docket.

E. N. HILL.

And on the fifteenth day of February, in the year eighteen hundred and ninety-eight, said motion for a new trial was denied. And on the twenty-eighth day of February, in the year eighteen hundred and ninety-nine, a rescript was received from the supreme judicial court, aforesaid, which is in the words as follows:

Rescript.

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth.

AT BOSTON, *Feb.* 28, 1899.

In the case of Robert A. Knight, assignee, *vs.* Simon Rothschild *et al.* pending in the superior court for the county of Hampden—

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court, viz: Exceptions overruled.

By the court:

HENRY A. CLAPP, *Clerk.*

February 28, 1899.

On the sixth day of March, in the year eighteen hundred and ninety-nine, said trustees, Smith & Murray, and Houston & Henderson, were charged, and said trustee, George A. Plummer, was discharged. It was therefore considered and ordered by the court that the said plaintiff recover judgment against the said defendants for the sum of seven thousand and seventy-one dollars and sixty-three cents, damages, and costs of suit, taxed at ninety-one dollars and seven cents, and that execution therefor issue against the goods, effects and credits of the said defendants in the hands and
58 possession of the said trustees, Smith & Murray and Houston & Henderson, who were by the court adjudged to be trustees of the said defendants.

Execution issued on the twenty-second day of March, in the year eighteen hundred and ninety-nine, which execution is in the words as follows:

Execution.

[L. S.] COMMONWEALTH OF MASSACHUSETTS, } ss.:
Hampden, }

To the sheriffs of our several counties or their deputies, Greeting:

Whereas, Robert A. Knight, of Springfield, in said county, in his capacity as assignee of the estate of James McKeon, of said Springfield, by the consideration of our superior court, holden at Springfield, within and for our county of Hampden, aforesaid, on the sixth day of March, A. D. 1899, recovered judgment against Simon Rothschild and Frank Rothschild, copartners, doing business under the firm name and style of S. Rothschild and Brother, both of the city, county and State of New York, for the sum of seven thousand and seventy-one dollars and sixty-three cents, damage; and
No. 195. ninety-one dollars and seven cents, cost of suit; and whereas, by the consideration of the same court, execution was awarded for the same sums against the goods, effects and credits of the said debtor, in the hands and possession of John M. Smith

and Peter Murray, both of said Springfield, copartners, doing business at said Springfield, under the firm name and style of Smith & Murray, and James A. Houston and Alexander Henderson, copartners, doing business under the firm name and style of Houston & Henderson, in Boston, in our county of Suffolk, trustees of the debtors as to us appears of record, whereof execution remains to be done:

Dam...	$7,071.63
Costs...	91.07
	$7,162.70

We command you, therefore, that of the goods, chattels or lands of the said debtors in their own hands and possession, and of the goods, effects and credits of the said debtors in the hands and possession of the said trustees, jointly and severally, you cause to be paid and satisfied unto the said judgment creditor, at the value thereof in money, the aforesaid sums, being $7,162.70 in the whole, with interest thereon, from the day of the rendition of the judgment, aforesaid, and therefore also to satisfy yourself for your own fees. And for want of goods, chattels or lands of the said debtors in their own possession, to be by them shown unto you, or found in your precinct, to the acceptance of the said judgment creditor, and for want of goods, effects and credits of the said debtors, in the hands and possession of the
59 said trustees, to be by them discovered and exposed to you, to satisfy the several sums, aforesaid, and interest, with your own fees.

We command you to take the bodies of the said debtors and them commit to our jail, in Springfield, in our county of Hampden, or any jail in your precinct, aforesaid, and detain in your custody, within our said jail, until they pay the full sums aforementioned, with your fees, or that they be discharged by the said judgment creditor, or otherwise by order of law.

Hereof fail not, and make return of this writ, with your doings therein, into the clerk's office of our said superior court, at Springfield, within our county of Hampden, aforesaid, in sixty days from the date hereof.

Witness, Albert Mason, Esquire, at Springfield, the 22nd day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

ROBERT O. MORRIS, *Clerk.*

On the ninth day of May, eighteen hundred and ninety-nine, said execution was returned into court without any return thereon.

I do certify that the foregoing is a true copy of the papers in the above-named case, and a transcript of the proceedings of the superior court therein.

In witness whereof, I have hereunto set my hand and affixed the [L. S.] seal of said court, on this ninth day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

ROBERT O. MORRIS, *Clerk.*

195.	Robert A. Knight, assignee.	Simon Rothschild *et al.* & trs.
Jury.	Knight. 1896, May 4, entered. Decl. May 11, ans. of Tr. John M. Smith (& Murray). July 3, ans. of Trs. Houston & Henderson (by consent). July 8, mo. for notice to def'ts. Allowed by Hon. Elisha B. Maynard, J. Notice ordered returnable 1st Monday Sept. Oct. 12, amended decl. (By consent.) Oct. 17, ans. 1897, June 19, amended decl. June 21, 2d jury. June 25, verdict for pl'ff for $6,420 dam. Rice, King & Rice. June 29, mo. for new trial. July 31, excepts. 1898, Feb. 15, mo. denied. 1899, Feb. 28, exceptions overruled.	Spellman for d'f'ts. (Sept. 16, 1896.) Leary for Smith & Murray, trs. W. M. Morgan for tr., G. A. Plummer, (34 School St., Boston.) E. N. Hill, June 26, 1897. (disappears Dec. 1, 1897.) 53 State St., Boston. (March 6th.) Judgment. Trs. Smith & Murray, and Houston & Henderson charged. Tr. Plummer discharged. Others not served. Dam..... $7,071.63 Costs..... 91.07 $7,162.70 Exon. issued Mar. 22, 1899.

Copy of Letter from E. N. Hill.

BOSTON, *June 25th*, 1897.

DEAR SIR: Will you please enter my appearance so that I will appear as attorney of record in the case of Robert A. Knight, assignee, *vs.* Solomon Rothschild and another.

Yours truly,

E. N. HILL.

Robert O. Morris, Esq.

61 COMMONWEALTH OF MASSACHUSETTS, *Hampden*, } ss:

Superior Court, Sitting A. D. 189–.

ROBERT A. KNIGHT, Assignee,
vs.
SIMON ROTHSCHILD ET AL. & TRUSTEE.

We severally certify that we have attended the number of days, and traveled the number of miles, by us set against our respective

names, as witnesses for the plaintiff in the above-mentioned case, at the time aforesaid.

Names of witnesses.	Towns traveled from.	Days' attendance.	Miles.	Amount.
				Dollars. Cents.
Lillian M. Dietz.....	Springfield ..	5	1	
Sam'l B. Spooner.....	" ..	1	1	
Edward H. Lathrop.....	" ..	1	1	
F. E. Carpenter, by R. A. K.....	" ..	1	1	
W. S. Miller, by R. A. K...	" ..	1	1	
		9	5	14

Bond.

Know all men by these presents, that we, Simon Rothschild and Frank Rothschild, as principals, and American Surety Company, of New York, as surety, are holden and stand firmly bound unto Robert A. Knight, as assignee of James McKeon, of Springfield, Massachusetts, in the sum of three thousand and ten dollars ($3,010), to the payment of which to the said Robert A. Knight or his executors, administrators, or assigns, we hereby jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas, the said Robert A. Knight as assignee of the said James McKeon, has caused the money and credits of said Simon Rothschild and Frank Rothschild, to the value of three thousand seven and $\frac{13}{100}$ dollars ($3,007.13), to be attached by trustee process, by virtue of a writ in favor of the said Robert A. Knight as assignee of James McKeon against the said Simon Rothschild and Frank Rothschild, principal defendants, and John M. Smith and Peter Murray, composing the firm of Smith & Murray, and James A. Houston and Alexander Henderson, composing the firm of Houston & Henderson, alleged trustees, which writ bears date the 17th day of April, A. D. 1896, and is returnable
62 to the superior court for the county of Hampden, in said Commonwealth, on the first day of May, A. D. 1896, and whereas the said Simon Rothschild and Frank Rothschild desire to dissolve said attachment according to law:

Now, therefore, if the said Simon Rothschild and Frank Rothschild shall, within thirty days after final judgment in the aforesaid action, or after special judgment entered therein, in accordance with

the provisions of section twenty-three of chapter one hundred and seventy-one of the Public Statutes of said Commonwealth, pay to the said plaintiff the sum for which the said trustees may be charged, not exceeding the value of the property in their hands, or so much thereof as will satisfy the amount that may be recovered by the said plaintiff, or if the said surety shall, within thirty days after the entry of any special judgment in said action, in accordance with section one of chapter four hundred and five of the statutes of said Commonwealth, for the year eighteen hundred and eighty-eight, pay to the said plaintiff the sum, if any, for which said judgment shall be entered, then this obligation shall be void, otherwise it shall be and remain in full force and virtue.

In witness whereof, we hereunto set our hands and seals this eighteenth day of September, A. D. 1896.

SIMON ROTHSCHILD,
Per F. ROTHSCHILD, JR., *Atty-in-fact.* [SEAL.]
FRANK ROTHSCHILD. [SEAL.]
AMERICAN SURETY COMPANY OF NEW YORK,
[L. S.] By DAVID B. SICKELS, *2nd Vice-President.*
CORTLAND S. VAN RENSSELAER, *Attorney.*

Signed and sealed in presence of—
FRANCIS T. GRIBBINS,
As to F. Rothschild, Jr., and Frank Rothschild.

26294.
C. R. F.

The above-named sureties and bond are approved by me.
ROBERT A. KNIGHT, *Plaintiff.*

63 *Affidavit of Compliance with Order of Notice Issued in the Superior Court. Left with Files July 6th,* 1899.

Pursuant to the within order I hereby certify that I caused an attested copy of the within order to be published as within directed in the Springfield Evening Union, a newspaper printed in Springfield, in said county, on the ninth, sixteenth and twenty-third days of July, A. D. 1896.

ROBERT A. KNIGHT.

COMMONWEALTH OF MASSACHUSETTS, } *ss:*
Hampden, }

SPRINGFIELD, MASS., *July 6th,* 1899.

Then personally appeared the above-named Robert A. Knight and made oath that the above certificate by him subscribed, is true.
Before me—
[L. S.] ELISHA H. BREWSTER,
Notary Public.

63½ [Endorsed:] No. 346. Simon Rothschild *et al.* (in error) *vs.* Robert A. Knight, assignee. Report. Hampden supreme judicial court, 1900.

64 *Rescript.*

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, May 15, 1900.

In the case of Simon Rothschild *et al.* (in error) *vs.* Robert A. Knight, assignee, pending in the supreme judicial court for the county of Hampden.

Ordered that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Judgment affirmed.

By the court:

HENRY A. CLAPP, *Clerk.*

May 15, 1900.

65 *Petition for Writ of Error.*

COMMONWEALTH OF MASSACHUSETTS, *Hampden*, } *ss:*

Superior Court.

SIMON ROTHSCHILD and FRANK ROTHSCHILD, Both of the City, County, State, and District of New York, Copartners, Doing Business under the Firm Name and Style of S. Rothschild & Brother and Having Their Usual Place of Business in said City of New York, Plaintiffs,

vs.

ROBERT A. KNIGHT, of Springfield, in the County of Hampden and Commonwealth of Massachusetts, as He is Assignee in Insolvency of the Estate of James McKeon, of said Springfield, Defendant.

To the honorable the justices of the superior court of the Commonwealth of Massachusetts, holden at Springfield, within and for said county of Hampden:

And now come the said Simon Rothschild and Frank Rothschild, of the city, county, and State of New York, and complain that manifest errors have happened, to the great damage of your petitioners, in the record and proceedings and also in the rendition of a judgment in a suit between them, as defendants, and Robert A. Knight, of Springfield, in the county of Hampden and Commonwealth of Massachusetts, as he is assignee in insolvency of the estate of James McKeon, of said Springfield, as plaintiff, in the superior court of said Commonwealth, holden at Springfield, within and for said county of Hampden, being the highest court of law of the said

State of Massachusetts in which a decision could be had in said suit and in which said court a final judgment was rendered against the said Simon Rothschild and Frank Rothschild on the seventeenth day of May, A. D. 1900, in said suit, wherein was drawn in question the validity of a statute of or authority exercised under said State of Massachusetts, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such their validity, and wherein was further drawn in question a title, right, privilege, or exemption under said Constitution of the United States specially set up and claimed by said Simon and Frank Rothschild and the decision was against the title, right, privilege, and exemption specially set up and claimed.

66 Wherefore your petitioners pray for a writ of error in said suit to issue in due form of law to the Supreme Court of the United States, to the end that said error shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf.

And your petitioners file herewith an assignment of errors which set out separately and particularly each error asserted and intended to be urged.

And your petitioners further offer a bond in such sum and with such good and sufficient sureties as may be approved by a justice of this honorable court that the said Simon and Frank Rothschild will prosecute their writ of error to effect and answer all costs if they shall fail to make their plea good.

SIMON ROTHSCHILD,
FRANK ROTHSCHILD,
By their att'ys, THOMAS J. BARRY.
H. J. JAQUITH.

Filed June 27, 1900.

67 *Assignment of Errors.*

UNITED STATES OF AMERICA:

Supreme Court of the United States.

SIMON ROTHSCHILD and FRANK ROTHSCHILD, Both of the City, County, State, and District of New York, Plaintiffs in Error,

vs.

ROBERT A. KNIGHT, of Springfield, in the County of Hampden, State and District of Massachusetts, as He is Assignee in Insolvency of the Estate of James McKeon, of said Springfield.

Assignment of errors by plaintiffs in error.

And now come said Simon Rothschild and Frank Rothschild, plaintiffs in error, and say that in the record and proceedings in the above-entitled suit there is manifest error in this, to wit:

1. That in said suit there was drawn in question the validity of an authority exercised under said State of Massachusetts as being repugnant to article 1 of the fourteenth amendment to the Consti-

tution of the United States, which was specially set up and claimed, in that these defendants were deprived of their property without due process of law, and the decision was in favor of the validity of the authority drawn in question.

2. That in said suit there was drawn in question the validity of an authority exercised under said State of Massachusetts as being repugnant to article 1, section 10, of the Constitution of the United States, which was specially set up and claimed, and the decision was in favor of the validity of the authority drawn in question.

3. That in said suit there was drawn in question the validity of a statute of the State of Massachusetts, to wit, chapter 157 of the Public Statutes of Massachusetts, on the ground of its being repugnant as construed to article 1, section 10, of the Constitution of the United States, which was specially set up and claimed, and the decision was in favor of the validity of said statute of Massachusetts as construed.

4. That in said suit there was drawn in question the validity of statutes of the State of Massachusetts, to wit, chapters 164 and 183 of the Public Statutes of Massachusetts, on the ground of *its*
68 being repugnant as construed to article 1 of the fourteenth amendment to the Constitution of the United States, which was specially set up and claimed, in that, as enforced, *it* deprived these non-resident plaintiffs in error of their property without due process of law, and the decision was in favor of the validity of said statute- of Massachusetts as construed.

5. That in said suit the superior court of the State of Massachusetts decided against the contention of the plaintiffs in error that it would not give full faith and credit to the judicial proceedings of the supreme court of the State of New York, as set forth in the evidence, as required by article 4, section 1, of the Constitution of the United States of America, although their attention was drawn thereto, and thereby defeated the rights of these plaintiffs in error to relief.

Wherefore the said Simon Rothschild and Frank Rothschild pray that the judgment of the superior court of the State of Massachusetts, holden at Springfield, within and for said county of Hampden, be reversed, and that the said Supreme Court of the United States may cause further to be done to correct said error what of right and according to the laws and custom of the United States should be done.

SIMON ROTHSCHILD,
FRANK ROTHSCHILD,
By their att'ys, THOMAS J. BARRY.
H. J. JAQUITH.

Filed June 27, 1900.

69 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *June* 26, 1900.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of Knight *vs.* Rothschild, decided on the 28th day of February, 1900.

GEO. F. TUCKER,
Reporter of Decisions.

70 ROBERT A. KNIGHT
vs.
SIMON ROTHSCHILD & Another.

Hampden, January 20, 1899; February 28, 1899.

Present: Holmes, Knowlton, Morton, & Lathrop, JJ.

Insolvent debtor; fraudulent conveyance; evidence; affidavit.

In an action by an assignee in insolvency to recover the value of a quantity of garments alleged to have been conveyed by the insolvent to the defendant in fraud of the insolvency laws, a person who had been employed in the insolvent's store for six years and knew the cost and selling price of all garments that came into the store during that period and also the fair value of such goods, and a part of whose business it was to sell them to customers, and who saw all the garments taken away by the defendant, is rightly allowed to testify to the value of such garments.

The affidavit of the defendant in an action by an assignee in insolvency to recover the value of goods alleged to have been conveyed by the insolvent to the defendant in fraud of the insolvency laws, and that of his attorney, filed in an action in another State brought by the present defendant against the insolvent, in which affidavit the defendant states that he was
71 present at an interview referred to in his attorney's affidavit, that he knew the contents of that affidavit, and that the statements therein were true, are rightly admitted in evidence; and the affidavit of the defendant's agent, filed in the same case in the other State, which tends to contradict some parts of his testimony in the present case which are unfavorable to the plaintiff, who called him as a witness, is also competent.

Tort, by the assignee in insolvency of the estate of James McKeon, to recover the value of a quantity of fur garments alleged to have been conveyed by McKeon to the defendants in fraud of the insolvency laws. At the trial in the superior court, before Lilley, J., the jury returned a verdict for the plaintiff; and the defendants alleged exceptions, which appear in the opinion.

C. C. Spellman & C. F. Spellman, for the defendants.

H. W. King & C. M. Rice (R. A. Knight with them), for the plaintiff.

KNOWLTON, *J.*:

The only exceptions that were argued in this case were to the admission of evidence against the defendants' objection.

1. The witness Dietz was rightly allowed to testify to the value of the fur garments taken away by the defendants. She had been employed in McKeon's store for six years, and knew the cost and selling price of all garments that came into the store during that period. She knew the fair value of such goods, and it was a part of her business to sell them to customers. She saw all the goods that were taken away by the defendants. She well might be permitted to give her opinion of their value.

2. The affidavits of the defendant Simon Rothschild and of his attorney Einstein, filed in the case in New York, were rightly admitted.* This defendant said that he was present at the interview referred to in the affidavit of Einstein, and that he knew the contents of Einstein's affidavit, and that the statements therein were true. These statements thus became admissions of the defendant, and they tended to establish the plaintiff's contention that McKeon was insolvent, that the defendants had reasonable cause to believe that he was insolvent, and that the goods were delivered as a preference.

3. The affidavit of the defendants' agent, Frank Roths-
72 & 73 child, filed in the same case in New York, was competent. It tended to contradict some parts of his testimony in the present case which were unfavorable to the plaintiff, and although the plaintiff called him as a witness, his adverse testimony might be contradicted by showing what he had previously stated, first directing his attention to the former statements by a question. Pub. Sts., c. 169, § 22. No contention was made that the requirements of the statute were not sufficiently complied with by the interrogating counsel.

Exceptions overruled.

74 [Endorsed:] Knight *vs.* Rothschild. Certified copy of the opinion of the supreme judicial court.

75 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *June* 26, 1900.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of Rothschild *vs.* Knight, decided on the 15th day of May, 1900.

GEO. F. TUCKER,
Reporter of Decisions.

76 KNOWLTON, *J.*:

The proceedings at the hearing were correct. Under our present practice issues of law and issues of fact may be joined in the pleadings upon a writ of error. Eliot *v.* McCormick, 141 Mass., 194. A

* This was an action brought by the present defendants against McKeon for goods sold and delivered.

single justice may properly hear all the evidence on the issues of fact and, if he chooses, report the case to the full court.

The questions principally discussed at the argument have been fully considered in recent cases of high authority and decided adversely to the plaintiffs in error. There was an attachment in due form by trustee process of debts due the original defendants from debtors residing in this Commonwealth. Pub. Sts., c. 164, § 1; c. 183, § 1. Such an attachment gives jurisdiction to render a judgment which will be valid everywhere as against the property attached. Ocean Ins. Co. *v.* Portsmouth Marine Railway, 3 Met., 420; Folger *v.* Columbian Ins. Co., 97 Mass., 267; Eliot *v.* McCormick, 144 Mass., 10; Cooper *v.* Reynolds, 10 Wall., 308; Pennoyer
77 *v.* Neff, 95 U. S., 714; Freeman *v.* Aldersen, 119 U. S., 714; Chicago, Rock Island, &c., Railway *v.* Sturm, 174 U. S., 710; King *v.* Cross, 175 U. S., 396; Cross *v.* Brown, 19 R. I., 220.

The plaintiffs in error do not contend that the attachments would not be effectual to give jurisdiction against the property if real estate or specific goods were attached; but their principal contention is that a debt due from a trustee to a non-resident defendant cannot be effectually attached under the statute cited. This contention is answered as to the law of this Commonwealth by the first two cases cited in the last paragraph. The plaintiffs in error contend that the debts due them from debtors in Massachusetts were not property within this Commonwealth upon the attachment of which jurisdiction could be founded as against a non-resident on whom no service was made in this State, and they argue that the situs of the property was in the State of New York, where they resided. It is true that for most purposes the situs of credits follows the creditor, and that their situs for taxation or for administration after the death of the creditor is ordinarily in the place of his domicil; but so far as the question before us depends upon the situs of the debt, it must be held that the situs in reference to collection is in the place where proceedings may be had against the debtor. That which ought to be paid is presumably in the possession of the debtor, wherever he happens to be. The debt can be collected by law only in the place
78 where jurisdiction of the debtor can be obtained. The creditor may come there to collect his debt. The situs of the debt, viewed as his property, follows him thither. The plaintiff in the trustee process represents the creditor's right. The question is, where the debt as property should be deemed to be situated in reference to process for collection. Practically it must be where the debtor is amenable to suit. This is the rule adopted by courts generally in the construction of statutes for the collection of debts by trustee process. Any other construction would leave these statutes ineffectual for the purposes for which they were enacted. In Cross *v.* Brown, 19 R. I., 220, the subject was considered at length with a citation of the authorities, and this conclusion was reached. In Chicago, Rock Island, &c., Railway *v.* Sturm, 174 U. S., 710, there was a discussion of the subject in reference to constitutional questions, with the same result, and in King *v.* Cross, *ubi supra*, affirming the decision of the supreme court of Rhode Island in the same case

under the name of Cross *v.* Brown, the doctrine was reaffirmed These cases settle the validity of an attachment by trustee process as the foundation for a judgment against a debt due from the trustee to a non-resident who is not served with process.

In the present case not only was there an attachment effectual to give jurisdiction to render the judgment against the defendant, but there was a voluntary general appearance by the original
79 defendants which gave jurisdiction to render a personal judgment against them. They appeared by duly authorized attorneys, in the usual way, and contested the case at all stages until judgment was rendered. That such an appearance gives jurisdiction without reference to service is familiar law. Pub. Sts., c. 167, § 82; Wright *v.* Andrews, 130 Mass., 149; Loomis *v.* Wadhams, 8 Gray, 557, 561; Eliot *v.* McCormick, 144 Mass., 10; Gilman *v.* Gilman, 126 Mass., 26; Hazard *v.* Wason, 152 Mass., 268; Cooper *v.* Reynolds, 10 Wall., 308, 317; Pennoyer *v.* Neff, 95 U. S., 714, 723, 731, 733.

Most of the other questions raised are sufficiently answered by the Pub. Sts., c. 187, § 3, which is as follows: "A judgment in a civil action shall not be arrested or reversed for a defect or imperfection in matter of form which might by law have been amended, nor by reason of a mistake respecting the venue of the action, nor because the judgment is not in conformity with the allegations of the parties, if it is in conformity with the verdict, nor shall any error in law in a civil action in which the defendant appeared and a verdict was rendered, except such as occurs after verdict, be assigned in a writ of error; but nothing herein contained shall prevent either party from assigning an error affecting the jurisdiction of the court."

Apart from this statute, the writ cannot be maintained. There is no necessary inconsistency between the counts of the
80 declaration and no such irregularity or imperfection as to affect the validity of the judgment. If the original defendants had raised objections by demurrer, it may be that an amendment would have been necessary, but it is plain that the judgment is well supported by the declaration. Hillman *v.* Whitney, 2 Allen, 268. The amendments to the declaration were regularly allowed by the court, with the consent of the duly authorized attorneys of the original defendants. The fact that the attorney who consented to the allowance of one of the amendments, although regularly employed, had not entered his appearance of record until later is of no consequence.

The action is not for a recovery of a penalty, but to recover the value of goods conveyed in fraud of the laws relating to insolvency, and it properly might be commenced by trustee process. Pub. Sts., c. 157, §§ 96, 97; c. 185, § 1.

The allowance of fees to two of the witnesses in the taxation of costs, upon a certificate signed in their name by their duly authorized agent, was not erroneous. The Pub. Sts., c. 199, § 14, is not to be construed so strictly as to require that the certificate shall be signed by the witness with his own hand. If the taxation were erroneous in this particular, it is at least doubtful whether the mis-

takes could be taken advantage of by a writ of error. See Goodrich v. Willard, 11 Gray, 380.

81 The entry of the judgment by the clerk without a special order of the court was in accordance with the statutes and the rule of the court which requires the entry of judgments under the general order of the court at stated times in all cases which are ripe for judgment. Pub. Sts., c. 171, § 1; St. 185, c. 384, § 12; rule XXVII of the superior court. It does not appear from the record that any judgment of a court in the State of New York was put in evidence at the trial, and the only judicial proceedings in that State referred to in the papers are suits to which the defendant in error was not a party.

Judgment affirmed.

82 [Endorsed:] Rothschild *vs.* Knight. Certified copy of the opinion of the supreme judicial court.

83 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Robert A. Knight, of Springfield, in the county of Hampden and Commonwealth of Massachusetts, as you are assignee in insolvency of James McKeon, of said Springfield, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, on the* 25th day of July next, pursuant to a writ of error filed in the clerk's office of the† superior court of the Commonwealth of Massachusetts for the county of Hampden, wherein Simon Rothschild and Frank Rothschild, both of the city, county, State, and district of New York, copartners, doing business under the firm name and style of S. Rothschild & Bro., and having their usual place of business in said city of New York, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable judge of the superior court of the Commonwealth of Massachusetts this twenty-sixth day of June, in the year of our Lord one thousand nine hundred.

ALBERT MASON,
Chief Justice of Superior Court.

* Not exceeding 30 days from the day of signing.
† Name of court to which writ of error is directed.

84 UNITED STATES OF AMERICA, } ss:
District of Hampden, }

SPRINGFIELD, MASS., *June 29th*, 1900.

I hereby certify that on the twenty-ninth day of June, 1900, I served the within citation by giving in hand to the within-named Robert A. Knight a true and attested copy thereof.

W. S. MILLER,
Deputy Sheriff.

Fees.

Service	$1.00
Copy	1.00
Return of precept 100 miles	3.30
	$5.30

85 COMMONWEALTH OF MASSACHUSETTS, } ss:
Hampden, }

I, Robert O. Morris, clerk of the superior court within and for said county of Hampden, hereby certify that the foregoing are true copies of—

1. The record in the case of Robert A. Knight, assignee, *vs.* Simon Rothschild *et al.;*
2. The petition for the writ of error, and
3. The assignment of errors.
4. The opinion of the full court as certified by George F. Tucker, reporter of decisions of the supreme judicial court of the Commonwealth of Massachusetts, on exceptions.
5. And the opinion of the full court as certified by George F. Tucker, reporter of decisions of the supreme judicial court of Massachusetts, on writ of error.

Both annexed to and transmitted with the record.

6. And of all the proceedings in said case with all things concerning the same.

Together with—

7. The original citation, and
8. The certificate of service thereon.

Seal of the Superior Court.

In witness whereof I have hereto set my hand and affixed the seal of said superior court this twenty-eighth day of June, in the year of our Lord one thousand nine hundred.

ROBERT O. MORRIS, *Clerk.*

86 *Bond.*

Know all men by these presents that we, Simon Rothschild and Frank Rothschild, both of the city, county, State, and district of New York, copartners, doing business under the firm name and style of S. Rothschild and Brother, and having their usual place of business in said city of New York, as principals, and the American

Surety Company of New York, a corporation, duly organized and existing by law and having a usual place of business in Boston, in the county of Suffolk and Commonwealth of Massachusetts, as surety, are holden and stand firmly bound and obliged unto Robert A. Knight, of Springfield, in the county of Hampden and Commonwealth of Massachusetts, as he is assignee in insolvency of the estate of James McKeon, of said Springfield, in the full and just sum of five hundred dollars, to be paid unto the said Robert A. Knight, assignee, or to his successors or successor; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

Sealed with our seals; dated at Boston the 26th day of June, in the year of our Lord one thousand nine hundred.

The condition of this obligation is such that whereas lately, on the 17th day of May now last past, in the superior court of the Commonwealth of Massachusetts, holden at Springfield, within and for said county of Hampden, in a suit pending in said court between said Simon Rothschild and Frank Rothschild, defendants, and said Robert A. Knight, assignee, plaintiff, a final judgment was rendered against said Simon Rothschild and Frank Rothschild, and said Simon Rothschild and Frank Rothschild having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Robert A. Knight, assignee, citing and admonishing him, the said Knight, to be and appear at a Supreme Court of the United States, to be holden at Washington, on the twenty-fifth day of July next:

Now, the condition of the above obligation is such that if the said Simon Rothschild and Frank Rothschild shall prosecute their
87 said writ of error to effect and answer all costs if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

SIMON ROTHSCHILD, [SEAL.]
By his att'y, H. J. JAQUITH.
FRANK ROTHSCHILD, [SEAL.]
By his att'y, H. J. JAQUITH.
AMERICAN SURETY COMPANY OF NEW YORK,
By S. N. ALDRICH,
Resident Vice-President.

(5c. revenue stamp, cancelled.)

Attest: [L. S.] WALLACE H. HAM,
Resident Ass't Secretary.

Approved:
ALBERT MASON,
Chief Justice Superior Court.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on

file in the office of the clerk of the superior court of the Commonwealth of Massachusetts, holden at Springfield, within and for the county of Hampden.

[Seal of the Superior Court.]

Attest: ROBERT O. MORRIS,
Clerk of said Superior Court.

Endorsed on cover: File No., 17,835. Massachusetts superior court. Term No., 108. Simon Rothschild and Frank Rothschild, copartners, doing business under the firm name & style of S. Rothschild & Bro., plaintiffs in error, *vs.* Robert A. Knight, assignee in insolvency of James McKeon. Filed July 18, 1900.

No. 108.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 108.

SIMON ROTHSCHILD AND FRANK ROTHSCHILD, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF S. ROTHSCHILD & BRO., PLAINTIFFS IN ERROR,

v.

ROBERT A. KNIGHT, ASSIGNEE IN INSOLVENCY OF JAMES McKEON.

BRIEF OF PLAINTIFFS IN ERROR

ON MOTION TO DISMISS OR AFFIRM.

HARRY J. JAQUITH,
THOMAS J. BARRY,
Counsel for Plaintiffs in Error.

BOSTON:
NATHAN SAWYER & SON, PRINTERS,
DEAN BUILDING, No. 60 INDIA STREET.
1901.

Supreme Court of the United States.

No. 108. October Term, 1901.

SIMON ROTHSCHILD and FRANK ROTHSCHILD,
Plaintiffs in Error,

v.

ROBERT A. KNIGHT, Assignee in Insolvency.

BRIEF OF PLAINTIFFS IN ERROR.

In Error to the Superior Court of the State of Massachusetts.

Statement of the Case.

The original action was alleged to be in contract or tort, and was by an assignee in insolvency appointed by a Massachusetts state court under authority of a state statute, who assumed to avoid by virtue of the authority given him by said statute contracts between the plaintiffs in error, citizens of New York, and the insolvent, a citizen of Massachusetts, and to repudiate and annul the judicial proceedings in New York in an action between the plaintiffs in error and the insolvent, and to recover the value of merchandise bought by the plaintiffs in error at an execution sale in New York City by the sheriff of the county of New York. In the course of the proceedings below numerous omissions and errors were made by the defendant in error, but on examination the Supreme Judicial Court of Massachusetts declared the procedure sufficient to support the judgment, although the plaintiffs in error raised the question that the pro-

ceedings did not constitute due process of law under the constitution of the United States, and were repugnant to article 1, section 10, and article 4, section 1, of the constitution.

The court below held that a debt contracted in New York and payable in New York could be reached by the trustee process in Massachusetts (Record, pp. 3, 4); that a failure to comply with the provisions of chap. 164, P.S. Mass., relating to actions against absent defendants was immaterial, and that failure to continue the action as required by statute did not abate it;

That a misjoinder of inconsistent causes of action in contract and tort without an averment that they are for one and the same cause of action is a sufficient procedure, although the effect of the verdict depends on whether the verdict was on the count in contract or in tort;

That a verdict so rendered is not ambiguous;

That an attorney retained to defend a transitory action against a non-resident could consent to changing it into a local action for a penalty by virtue of such retainer;

That under Massachusetts practice it is permissible, after trusteeing the property of a foreign defendant in a transitory action and getting him into court to protect his property, to amend the action into one that is local and for a penalty and hold the defendant to his appearance.

The plaintiffs in error submit that this construction of chaps. 157, 164, and 183 P. S. Mass. deprives them of a constitutional right to immunity from extra-territorial laws and from being haled into the courts of a foreign state for an alleged infraction of its laws, except by personal service or requisition, the acts complained of having been done in New York and under the laws of New York.

These acts clearly appear in the record on the following pages:

Simon and Frank Rothschild, the plaintiffs in error, are brothers and compose the firm of S. Rothschild & Brother; both reside in New York City and have their usual place of business there (Record, p. 20). Among their customers was one James McKeon, having his usual place of business and residence in Springfield, Mass. (Record, p. 20.)

On the twentieth day of December, 1895, James McKeon owed S. Rothschild & Brother, the plaintiffs in error, three thousand eight hundred and sixty-five dollars and twenty-five cents ($3,865.25). (Record, p. 35.)

December 20, 1895, Frank Rothschild, Jr., an employee of the plaintiffs in error, having their authority to use his judgment in the collection of debts due them, went to Springfield in their behalf and also that of another New York firm, S. F. & A. Rothschild, to whom Mr. McKeon owed two thousand dollars ($2,000). (Record, p. 38.)

Frank Rothschild, Jr., on interrogating McKeon the next day, learned that he was insolvent. Thereupon it was agreed that the firm of S. Rothschild & Brother should furnish the cash to make a compromise offer of twenty-five cents ($0.25) on the dollar to McKeon's creditors, — McKeon to send goods to them in New York to secure them on their promised advances. This was done on the 20th of December, 1895, and a receipted bill made for the goods. (Record, pp. 39–42.)

Thereafter, in pursuance of said agreement, Frank Rothschild, Jr., advanced to McKeon the sum of one hundred dollars ($100), with which to effect an extension of a pressing debt, and this sum is credited by the plaintiff below in his declaration. (Record, pp. 40 and 18.)

December 22, 1895, McKeon went to New York and conferred with the plaintiffs in error at the office of their attorneys, Einstein & Townsend. At the suggestion of Mr. Einstein, that the receipted bill did not show the true transaction, McKeon tore the receipt off and marked the bill "Memo." (Record, pp. 36, 37.)

December 23, 1895, plaintiffs in error sued McKeon in the New York Supreme Court for the city and county of New York, making service on him personally and attaching the goods on the "Memo." invoice. (Record, p. 37.)

December 23, 1895, the plaintiffs in error, in furtherance of the agreement made by their employee, agreed to release their attachment and discontinue proceedings if McKeon effected a composition in fifteen (15) days. (Record, p. 51.)

December 27, 1895, part of the goods were replevied by L. Cohen & Brothers, who sold them to McKeon, and the plaintiffs in error gave bonds for their value. The suit is still pending. (Record, p. 35.)

McKeon did not effect a compromise, and the plaintiffs in error never advanced anything under their agreement except the one hundred dollars ($100) advanced by Frank Rothschild, Jr., in Springfield. (Record, p. 45.)

Later the plaintiffs in error secured judgment, and the goods were sold at an execution sale in New York by the sheriff of the county for two thousand nine hundred and eighty-two dollars ($2,982), which price the plaintiffs in error bid for them. (Record, pp. 41, 53.)

A petition in insolvency was filed against McKeon in the Insolvency Court for Hampden County on January 7, 1896. The defendant in error was appointed assignee February 20, 1896. (Record, p. 25.)

April 17, 1896, the defendant in error, as assignee of McKeon, brought suit by the trustee process in the Superior Court for Hampden County, the writ being returnable the first Monday in May, 1896. The officer's return shows service on the trustee, but none on the plaintiffs in error. (Record, pp. 14–16.)

On the return day of the writ, a justice of the Superior Court was sitting in Hampden County, and on the 8th of June, 1896, another sitting of the Superior Court was held. (Record, p. 5; P.S. Mass., chap. 152, sect. 17; Acts 1885, chap. 27.)

No continuance was asked, nor was any suggestion made to the court that the plaintiffs in error, then defendants, were absent from the state and unserved, until at a sitting of the Superior Court, July 8, 1896, when such suggestion was made and order of notice by publication was granted, returnable the first Monday in September, 1896. (Record, pp. 19, 56; Rule 54; Record, p. 5.)

The record does not show any service by publication, but at the hearing before the single justice evidence was admitted against the objections of the plaintiffs in error to show that service was actually made as ordered. (Record, pp. 3, 56, 58.)

September 16, 1896, C. C. Spellman, Esq., appeared generally for the plaintiffs in error, under Rules X. and XII. of Superior Court, and never withdrew as counsel of record. (Record, pp. 3, 21.)

June 19, 1897, the defendant in error filed an amendment to his declaration, assented to by one E. N. Hill, as attorney for plaintiffs in error. (See Rules X. and XII., Record, pp. 4, 5, 23.)

June 21, 1897, a jury was impaneled, and on that day E. N. Hill, who had been retained to try the case, conducted the case as attorney for the plaintiffs in error. (Record, p. 3.)

June 25, 1897, the jury returned a verdict for the plaintiff below, and on June 26, 1897, E. N. Hill first entered his appearance formally as attorney of record and moved for a new trial. (Record, pp. 24, 56.)

July 31, 1897, exceptions were filed by Spellman and allowed (Record, pp. 25–53, 56). One of the exceptions saved was a general one "that the action could not be maintained" (Record, p. 53); this exception was submitted to the Supreme Judicial Court without argument. (Record, p. 63.)

December 1, 1897, E. N. Hill withdrew as counsel of record. (Record, pp. 53, 56.)

March 6, 1899, judgment for the defendant was entered. (Record, pp. 54, 55.)

In March, 1899, judgment charging the trustees was entered up without special order of the Superior Court, and without notice to them or the defendants below. (Record, pp. 54, 56; Rule 27, Sup. Court, pp. 4, 5.)

May 12, 1899, the plaintiffs in error filed their assignment of errors in the state proceedings. (Record, pp. 8, 9.)

June 20, 1899, the plaintiffs in error, by leave of court, amended their assignment of errors by adding to them. (Record, p. 10.)

July 7, 1899, the defendant in error filed his plea and traverse, and September 8, 1899, his amendment. (Record, pp. 11–13.)

Later there was a hearing before a single justice to establish the facts alleged in traverse by the defendant in error (Record, pp. 2–4), after which the cause was heard by the Supreme

Judicial Court of Massachusetts, and on May 15, 1900, a rescript was sent to the Superior Court affirming the judgment. (Record, p. 59.)

June 26, 1900, this writ of error was sued out and allowed by the Chief Justice of the Superior Court of Massachusetts (Record, p. 66), and on July 18, 1900, was filed with the clerk of this court. (Record, p. 69.)

Jurisdiction.

A writ of error is a continuation of the original suit.

Cohens *v.* Va., 6 Wheat. 264, 410, 411.
Clark *v.* Mathewson, 12 Pet. 164, 170.
Nations *v.* Johnson, 24 How. 195. 204, 205.

Affirmance is not a new judgment, but merely directs the judgment already given to be executed.

Schwab *v.* Berggren, 143 U.S. 442.
Fielden *v.* Ills., 143 U.S. 452.

In Massachusetts actions at law may be reviewed on the law either by exceptions or by writ of error.

P. S. Mass., chap. 187, sects. 1–15. See Appendix A.
P. S. Mass., chap. 153, sect. 8. See Appendix B.

A right to exceptions does not limit or avoid the right to review the law by writ of error.

Hemenway *v.* Hicks, 4 Pick., 497.
Peck *v.* Hapgood, 10 Met. 172, 175.
Elder *v.* Dwight, 4 Gray, 201, 204.

This right is fully recognized by the Supreme Judicial Court of Massachusetts in the proceedings and opinion in this case, and it is well established that in Massachusetts courts, under the writ, new matter may be given at the hearing before the single justice as facts to support or defeat the judgment of the lower court.

Bodurtha *v.* Goodrich, 3 Gray, 508.
Bailey *v.* Edmonson, 168 Mass. 297.
Conto *v.* Silvia, 170 Mass. 152.

The Supreme Court of Massachusetts, having considered the questions involved as properly before them and passed upon them, the defendant in error cannot be heard to allege that such questions were not raised in time.

Sully *v.* Am. National Bank, 178 U.S. 289, 298.

This Court has held that a federal question was raised in time when first raised in a petition in error to the State Supreme Court.

Arrowsmith *v.* Harmoning, 118 U.S. 194, 195.

And that under the provisions of section 709 R.S. it is not necessary that federal questions of the first two classes should be specifically set up and claimed if they appear in the record and their determination was necessarily involved in the case.

Water Power Co. *v.* St. Ry. Co., 172 U.S. 475, 487.

And that "if a federal question is fairly presented in the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim but avoids

all reference to it is as much against the right within the meaning of section 709 R.S. as if it had been specifically referred to and the right directly refused."

Chapman *v.* Goodnow, 123 U.S. 540, 548.

This Court has taken judicial notice that in Massachusetts the record remains with the Superior Court, the highest court after pronouncing its judgment returning the record to it.

Atherton *v.* Fowler, 91 U.S. 143, 146.

And this Court by Mr. Justice Gray in McDonald *v.* Massachusetts, 180 U.S. 311, has just affirmed as correct a procedure exactly similar to that taken in this case.

The cases cited by the defendant in error on page 3 of his brief are all of them excellent authorities for the proposition that errors raised in a petition for a rehearing are raised too late if the rehearing is denied; here there was no petition for a rehearing. In Massachusetts the writ of error is a writ of right for correcting error apparent in the record. The giving of a *supersedeas* bond is optional in both state and federal practice. The plaintiffs in error gave bond for the costs, as required by federal law (Record, p. 67), and the defendant in error holds a bond to dissolve attachment (Record, p. 57) on which suit is now pending.

The rule is well established that there can be no averment in pleading against the validity of a record.

Biddle *v.* Wilkins, 1 Pet. 686, 692.

"The record imports absolute verity . . . and when the Court, which in addition may be supposed to hawe personal knowledge of the fact, sustains the recital in the record as against the statement in the affidavit, its ruling cannot on review be adjudged erroneous."

Evans *v.* Stellnisch, 149 U.S. 605, 607.

See also opinion of this Court in McDonald *v.* Mass., 180 U.S. 311, 312, where Mr. Justice Gray says, after noting a trial in the Superior Court: "The defendant sued out a writ of error from the Supreme Judicial Court of Massachusetts, which affirmed the judgment, 173 Mass. 322. He then sued out this writ of error from this Court to the Superior Court, in which the record remains."

And it is said in Hudgins *v.* Kemp, 18 How. 530, 534: "Upon a motion to dismiss, as well as on the hearing on the merits, no evidence dehors the record, as certified and returned by the clerk of the Circuit Court, can be received here to impeach its verity."

The clerk of the Superior Court certifies that he has the record set out in his return to the writ of error to this Court, and the defendant in error cannot be heard to dispute any part of it.

It is submitted that this Court has jurisdiction of the case.

Murray *v.* Charleston, 96 U.S. 432, 442.
Myrick *v.* Thompson, 99 U.S. 291, 294.
Hartman *v.* Greenhow, 102 U.S. 672, 676.

Answer to Motion to Affirm.

The defendant in error misapprehends the limits that this Court has often laid down in its decisions on writs of error from state courts; the plaintiffs in error do not assume to review here a single finding of fact in either the Superior or Supreme Court of Massachusetts, except as those facts found depend upon an erroneous construction of the law.

Worthen *v.* Cleveland, 129 Mass. 570.

They now ask to be heard on the law, and, while it may seem frivolous to the defendant in error, the plaintiffs in error respectfully ask that the merits be considered.

Where on the facts appearing in the record no amount of proof could obviate the objections to the judgment the Court will reverse the judgment whether the specific objection was raised in the trial court or not.

Slater *v.* Rawson, 1 Met. 450, 457.
Bond *v.* Bond, 7 Allen, 1, 6.
Comm. *v.* Meserve, 154 Mass. 64, 75.
Lyon *v.* Prouty, 154 Mass. 488, 490.
Brick *v.* Bosworth, 162 Mass. 334, 336.

The record shows (pp. 53, 63) that a general exception was taken before the trial court to the sufficiency of the cause of action, and while not argued it was not abandoned at the hearing before the Supreme Judicial Court.

That this general exception raises the federal questions involved and necessary to determination of the cause, see the record in this Court in McClellan *v.* Chipman, No. 252, October term, 1894 (p. 25), and the decision of this Court that the federal question was raised therein.

McClellan *v.* Chipman, 164 U.S. 347.

The only ground on which this Court is asked to affirm the judgment below is that the errors assigned are frivolous; the plaintiffs in error are perfectly willing to submit their case on this motion of the defendants in error.

First Assignment.

"That in said suit there was drawn in question the validity of an authority exercised under said state of Massachusetts as being repugnant to article 1 of the fourteenth amendment to the constitution of the United States, which was specially set up and claimed, in that these defendants were deprived of their

property without due process of law, and the decision was in favor of the validity of the authority drawn in question."

This error was brought to the attention of the Superior Court by exception (Record, p. 53, line 15), and was before the Supreme Judicial Court without argument (Record, p. 63), and in assignments 1, 2, 3, 4, 5, 6, 10, and 11 in the writ of error to the Supreme Judicial Court. (Record, pp. 8, 9.)

A.

As was said in the brief of the plaintiffs in error filed in the Supreme Judicial Court of Massachusetts: "The record shows that the judgment in the court below could not have been rendered except by the court sustaining the validity of certain of the Public Statutes of Massachusetts, — viz., chapter 164, relating to absent defendants; chapter 183, relating to the trustee process; and chapter 157, relating to insolvency, — in their interference with the constitutional rights of the plaintiffs in error, as non-residents, to contract with the citizens of this state." (Appendixes C, D, E.)

The Supreme Judicial Court of Massachusetts, in its opinion, substantially held that the proceedings were irregular in some features, but that the record was sufficient to support the judgment, and the plaintiffs in error raise the question whether those proceedings below are sufficient to constitute due process of law.

In order to give jurisdiction there must be a court with power to hear and determine the cause, a plaintiff, and a defendant duly served or appearing, or a valid attachment of property of the defendant.

The action at first gave no notice to anyone that the insolvent law of the state was involved, except the statement of the capacity of the plaintiff, but that statement was not significant of a local action to rescind a contract under a local law. Service was not made on the defendants; no continuance was asked for by the plaintiff below and granted by the Court as required by the state law; and the plaintiffs in error contend that there was no valid attachment, and that therefore the action failed with the end of the return term of the writ and could not be

revived; and that this was not an amendable or formal error, but went to the root of the jurisdiction of the Court to hear and determine the cause, and that the error might be called to the attention of the Court at any time to arrest or reverse the judgment.

B.

A decision of a state court that its proceedings or the provisions of a statute constitute "due process of law" is not decisive upon this Court.

Hallinger *v.* Davis, 146 U.S. 314, 320.

Nor are they decisive in any case in which the contention turns upon general rather than strictly local law.

Swift *v.* Tyson, 16 Pet. 1, affirmed.
B. & O. R.R. *v.* Baugh, 149 U.S. 368, 371.

The prohibitions of the fourteenth amendment "refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities."

Blake *v.* McClung, 172 U.S. 239, 260.
C. B. & Q. R.R. *v.* Chicago, 166 U.S. 226.

The powers of such instrumentalities "cannot be exercised with the effect of defeating or impairing rights secured to citizens of the several states by the supreme law of the land."

Blake *v.* McClung, *supra*, p. 254.

A state insolvency law cannot be given extra-territorial effect; if it is construed to interfere with the contracts of non-residents, it is unconstitutional and void.

"When in the exercise of that power the states pass beyond their own limits and the rights of their own citizens and act upon the rights of citizens of other states, there arises a conflict of sovereign power and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other states and with the constitution of the United States."

Ogden *v.* Saunders, 12 Wheat. 213, 369.

"Insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extra-territorial operation."

Baldwin *v.* Hale, 1 Wall., 223, 234.

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Norton *v.* Shelby County, 118 U.S. 425-442.

In Graves *v.* Neal (57 F. R. 816), Judge Putnam in the First Circuit, while assuming that a similar action under Minnesota law was transitory and under the decision of this Court in Huntington *v.* Attrill (146 U.S. 675) enforceable wherever the defendant could be served, yet suggested that if the goods were removed from Minnesota before the appointment of an assignee the right of action might never vest, and on this point the plaintifls in error cite the decision of this Court in King *v.* Cross (175 U.S. 396), that under the Massachusetts law the bankrupt's title to his property is not divested until the first publication of notice, and as the goods forming the subject of this action were removed from Massachusetts December 20, 1895

(Record, pp. 39, 40), while the publication was after January 7, 1896 (Record, p. 25), no right of action vested in the assignee, the defendant in error.

But in this case the right of action is dependent on an *intent* to evade the law, etc. (Appendix E), yet neither of the plaintiffs in error knew anything of the transaction until after the goods were in New York state and out of the jurisdiction of Massachusetts. (Record, pp. 35, 38, 40.)

As set out in the brief below, "the plaintiffs in error, as citizens of the state of New York, had a legal right to contract with McKeon, and having become his creditors they had a legal right to receive payment for the debt, either in cash or by purchase of merchandise and a set-off, or to receive a consignment of goods as an hypothecation or otherwise, and thereafter to deal with them under the laws of the state of New York. This right they could not be deprived of at any time by the law of Massachusetts. The most that the state insolvency law could do was to take possession of the insolvent's estate and deprive the plaintiffs in error of the remedy of preliminary attachment; all other rights of suit and execution were preserved to them by the constitution of the United States. Until the Insolvency Court took possession of the insolvent's estate the plaintiffs in error had a constitutional right to receive any portion of it in payment of his debt or as security, and the provision of the Massachusetts Insolvency Act, providing that an assignee in insolvency may avoid a contract made by the bankrupt within six months prior to his adjudication as insolvent, and providing a penalty for receiving a payment or security amounting to a preference, is inoperative as to these non-residents, plaintiffs in error.

"If the law is construed to be applicable to these non-residents, then these provisions are abridgments of rights, privileges, and immunities guaranteed by the fourteenth amendment to the constitution of the United States; and, if these provisions are not applicable to them, then the judgment of the Superior Court is erroneous and deprives them of their property without due process of law, contrary to the fourteenth amendment.

"Gilman *v.* Lockwood, 4 Wall. 409.
Ogden *v.* Saunders, 12 Wheat. 213.
Pennoyer *v.* Neff, 95 U.S. 714.
Savoye *v.* Marsh, 10 Met. 594, 595.
Baldwin *v.* Hale, 1 Wall. 223, 234.

"The plaintiffs in error submit that as the record shows (pp. 35, 40) they were not at any time within the jurisdiction of Massachusetts when the acts set out in the declaration of the plaintiff below took place; that they cannot, as a matter of law, be held to have had any intent to defeat the insolvency laws of Massachusetts, they owed no allegiance to the laws of Massachusetts, they were not bound to know them, and they could not commit an offence against them by an act committed in or a purpose held while residing in New York, and the judgment of the Superior Court is therefore erroneous as a matter of law.

"Further, an action for a penalty is not such a 'personal action'—that is, transitory—as may be brought against an absent defendant under Public Statutes, chapter 164. A penalty means punishment, and involves jurisdiction over the culprit before it can be inflicted.

"Galpin *v.* Page, 18 Wallace, 350.
Freeman *v.* Alderson, 119 U.S. 185, 188."

The fact that an agent of the defendants below was in the state of Massachusetts cannot be imputed to them to show an intent; the only cases found to that effect are where all the parties were bound by the law: in this case the plaintiffs in error owed no allegiance to the law.

Sage *v.* Wynkoop, F. C. 12,215.
Vogel *v.* Lathrop, F. C. 16,985.
Mayer *v.* Herman, F. C. 9,344.
Graham *v.* Stark, F. C. 5,676.
Wright *v.* Muxlow F. C. 17,629.
Sartwell *v.* North, 151 Mass. 142, 146.
Bush *v.* Moore, 133 Mass. 198.
Rogers *v.* Palmer, 102 U.S. 263.

The construction of a state law by the highest court of a state binds this Court as to what that law means, and the constitutionality of the law is determined by such construction.

Wood *v.* Brady, 150 U.S. 18.
Allgeyer *v.* La., 165 U.S. 578.
R.R. Co. *v.* Texas, 177 U.S. 66.
Los Angeles *v.* Water Co., 177 U.S. 558.

The law of Massachusetts involved being a nullity so far as non-residents' obligations to it are concerned, proceedings founded upon it do not constitute due process of law, are fatally defective, and the question may be raised at any time.

Capron *v.* Van Noorden, 2 Cranch. 126.
Striker *v.* Mott, 6 Wend. 465.
Windsor *v.* McVeigh, 93 U.S. 274, 282.
Voorhees *v.* U.S. Bank, 10 Pet. 473.
U.S. *v.* Arredondo, 6 Pet. 709.
Cooper *v.* Reynolds, 10 Wall. 308, 316.
Ex parte Lange, 18 Wall. 163.

Waiver cannot cure such proceedings.

Chase *v.* Palmer, 25 Me. 341, 345.
Atty. Gen. *v.* Moliter, 26 Mich. 444, 448.
U. P. R.R. *v.* Ogilvie, 18 Neb. 639, 640.
Collins *v.* Keller, 58 N. J. L. 429, 430.
Musselmans Ap., 101 Pa. St. 169, 171.
Trustees *v.* Stocker, 13 Vroom, 115, 116.
Whitelmist *v.* Pettipher, 105 N.C. 40.
Lamson *v.* Worcester, 58 Vt. 381, 388.
Poindexter *v.* Burwell, 82 Va. 507, 512.
Carlisle *v.* Weston, 21 Pick. 535, 536.
Osgood *v.* Thurston, 23 Pick. 110, 111.
Mastick *v.* Sup. Ct., 94 Cal. 347, 350.

Tootle *v.* French, 2 Idaho, 746.
Way *v.* Way, 64 Ills. 406, 410.
Richards *v.* L. S. & M. S. Ry., 124 Ills. 516, 519.
R.R. Co. *v.* Sutton, 130 Ind. 405.
McCoy *v.* Able, 131 Ind. 419, 420.
Orcott *v.* Hanson, 71 Ia. 514.
In re Grogan, 13 Misc. R. 363 (N.Y. Surrogate).

Where by reason of a federal law the state court has no jurisdiction of the cause of action, jurisdiction cannot be given by waiver or filing a bond. It is a case of want of jurisdiction of the subject matter.

Hamilton *v.* Merrill, 37 Ohio St. 682, 684.

The cause of action must arise under laws which bound the defendants below. This principle is established in the reasoning of this Court on the exceptions of D'Arcy, in

D'Arcy *v.* Ketcham, 11 How. 165.

Notice and hearing alone do not constitute due process of law.

C. B. & Q. R.R. *v.* Chicago, 166 U.S. 226.

C.

The authority of a court to proceed in a suit begun by attachment is well established, and the action will support a personal judgment if the defendant comes in and litigates.

Mayhew *v.* Thacher, 6 Wheat. 129.
Pennoyer *v.* Neff, 95 U.S. 714, 725.

If there was no valid attachment and no appearance, service, or continuance, the action was discontinued by operation of law on the return day, or at most with the return term.

Riggs *v.* Chester, 2 Cranch. C.C. 637.
Cooper *v.* Reynolds, 10 Wall. 308, 318.
Freeman *v.* Alderson, 119 U.S. 185, 188.

At the time the writ was returned into court the only attachment that had been made was by trusteeing debts contracted and payable in New York. (Record, pp. 15, 4.)

These debts were not subject to the trustee process of the state of Massachusetts.

Wabash R.R. *v.* Tourville, 179 U.S. 322, 327.

It is submitted that a state can only separate the situs of a credit from a non-resident owner when the debt is either contracted or payable in the state where the garnishment is made.

The Massachusetts decision is in flat contradiction of the opinion of this Court in R.R. *v.* Tourville, *supra*.

Sturtevant *v.* Robinson, 18 Pick. 175.

It is clearly required by public policy that a creditor's debt shall not be ambulatory with the debtor, the policy of Congress has been to require suits to be brought in the district of the defendant, and the decisions of this Court are uniform that he can only be sued *in personam* in a state where he is found. Without the distinction established by this Court, in R. R *v.*. Tourville, *supra*, is enforced, a State of Maine debtor traveling to California may there be compelled to answer in a garnishee proceeding, and judgment against a New York principal defendant be obtained after publication and without actual knowledge of the suit on his part; or, if notified, he may be compelled to appear and defend at great expense and disadvantage.

This Court used sweeping language in Ogden *v.* Saunders, 12 Wheat. 213, 367: "The constitution has produced such a radical modification of state power over even their own contracts, in the hands of individuals not subject to their jurisdiction, as to furnish ground for excepting the rights of such individuals from the power which the states unquestionably possess over their own contracts and their own citizens.

"The reason is that those laws are municipal and peculiar, and appertaining exclusively to the exercise of state power in that sphere in which it is sovereign, — that is, between its own citizens, between suitors subjected to state power exclusively, in their controversies between themselves."

In this case at bar the contract was made, executed on one side by the shipment of merchandise, and to be executed by the other side by payment in New York; and it is submitted that the situs of the debt was out of Massachusetts, so that it could not be trusteed.

If there was no valid attachment, and no service or appearance at the return term of the writ, the action became discontinued under the writ, and all subsequent proceedings were a nullity; the life of the writ could not be thereafter extended.

Jacobs Fisher's Digest, p. 10,535.
Fisher *v.* Cox, 16 L.T.N.S. 397.

D.

A plaintiff cannot have judgment for any other cause of action against a non-resident defendant than that stated in the attachment or in the publication.

Janney *v.* Spedden, 38 Mo. 395.

The writ shows an action in contract or tort (Record, p. 14); the declaration shows an action for goods delivered (Record, p. 16); the publication shows an action in contract or tort

(Record, p. 20); and, although no return of service by publication was ever made, the defendants appeared on this statement, which must certainly mean that the action they were summoned in on was a transitory action, enforceable against them wherever they could be found. An attorney was retained to defend the action brought (Record, p. 21); after this the cause of action was changed to one for impairing, hindering, impeding, and evading the insolvency law of Massachusetts (Record, p. 22) (see Appendix E), and for a fraud on the insolvency law of Massachusetts. (Record, p. 23.)

On the face of the record these amendments changed the action from a transitory to a local one, and were not authorized by the defendants. (Record, p. 4.)

"Whether an amendment will relate back to the commencement of the suit, or operate only from its date, must depend upon whether it merely cures a defect in the original proceedings, or is in substance the commencement of new litigation."

Burgie *v.* Sparks, 11 Lea, 84, 88.

Clearly these amendments introduced a new cause of action, the declaration as filed was complete and sufficient for a recovery in contract for the value of the goods alleged to have been delivered, the amendments introduced a new cause of action, — viz., the fraudulent intent to impair, hinder, impede, and evade the insolvency laws of Massachusetts. (See Appendix E.)

E.

It is submitted that an action to recover a preference under the insolvency law of Massachusetts is not a transitory action within the definition in Huntington *v.* Attrill. Although not a criminal law, offences against it are punishable by imprisonment if committed after a petition is filed (P. S. Mass., chap. 157, sect. 119, and chap. 216, sect. 103), or by forfeiture of discharge or property if committed before the petition is filed (chap. 157, sects. 93 to 95, and sects. 33, 96, and 98).

The gist of the offence is not a fraud upon any individual, for at common law there is none, but a fraud and evasion of the statute (sects. 96 and 98, Appendix E).

The offence when committed cannot be availed of by a creditor, but must be prosecuted by an officer of the court holding title under the statute, and the forfeiture, while it may inure to the creditors, is not to them.

It is submitted that the action is penal and not contractual, "a pecuniary forfeiture inflicted for committing some specified offence."

3 Stephens Comm. 535.
U. S. *v.* Choteau, 102 U.S. 603, 611.

There being no authority at common law for the use of the trustee process for commencing an action for infringing a penal statute, it appears to be clearly an infringement of a right, privilege, or immunity secured to non-residents by the fourteenth amendment to the constitution.

F.

The first count was a count in contract, the second and third counts were for offences against the laws of Massachusetts, by reason of which offences, if proved, the plaintiff below was entitled to recover, but not otherwise; the verdict was a general one, and the Court cannot gather from it anything more than guessing grounds as to what count the jury found on; they could not find under all three, and none of the counts were discontinued. If the verdict was under the first count the defendant below must pay $7,071.63 and interest and costs; if under the second or third counts the defendants must pay that sum and forfeit their dividend on $3,865.25.

P. S. Mass., chap. 157, sect. 33 (Appendix E).

It being uncertain upon what ground the verdict was found, the plaintiffs in error submit that the proceedings do not constitute due process of law, and that they are void under the provisions of the fourteenth amendment to the constitution of the United States.

Rindge *v.* Green, 52 Vt. 204, 209.
Steen *v.* Norton, 45 Wis. 412.
Holmes *v.* Doane, 9 Cush. 135, 140.
Whiting *v.* Cook, 8 Allen, 63, 64.
York *v.* Johnson, 116 Mass. 482.
Peterson *v.* Patrick, 126 Mass. 395.
Clapp *v.* Campbell, 124 Mass. 198.

The Supreme Court of Massachusetts has recently held to the common-law rule in this respect.

Kilberg *v.* Berry, 166 Mass. 488.

This Court has recently held that, in order to have the proceedings in a state court held due process of law, they must be founded upon reasonable rules or laws, and that the reasonableness of those rules or statutes is a matter for the determination of this Court upon the facts.

Iowa Cent. Ry. *v.* Iowa, 160 U.S. 389, 393.
Roller *v.* Holly, 176 U.S. 398, 413.

In the last case, the point on which the case turned was the reasonableness of the time limit in the notice given; but on the principle involved the plaintiffs in error submit that this Court will scrutinize the record of the proceedings below, not to ascertain whether the questions of practice or fact were correctly determined, but whether the record discloses proceedings sufficient to constitute due process of law, and that in determining

that question the common-law decisions of this Court will control if unchanged by state statute.

Certainly it cannot be said of this case, as was said by this Court in Hallinger *v.* Davis, 146 U.S. 314, 324, "The trial seems to have been conducted in strict accordance with the forms prescribed by the constitution and laws of the state, and with special regard for the rights of the accused thereunder."

G.

Construction of court that a general retainer of counsel authorized counsel to allow amendments.

The former decisions of the Supreme Judicial Court of Massachusetts are that an attorney by virtue of his employment can only prosecute or defend the cause of action for which he was retained.

Moulton *v.* Bowker, 115 Mass. 36.
Sartwell *v.* North, 144 Mass. 188.

The decision in this case is that the attorney had a power formerly denied. This later decision cannot enlarge the attorney's power in this case beyond its former construction.

Gelpcke *v.* Dubuque, 1 Wall. 175.

If the attorneys did not have the power to allow these amendments without the knowledge and consent of the defendants below, the proceedings cannot be called due process of law.

The lack of authority may be set up after a trial upon the merits.

Wright *v.* Andrews, 130 Mass. 149, 150.
Graham *v.* Spencer, 14 F.R. 603, 607.

H.

This Court has repeatedly held that state insolvency laws can have no extra-territorial effect.

Ogden *v.* Saunders, 12 Wheat. 213.
Sturgis *v.* Crowninshield, 4 Wheat. 122.

Hence the assumed authority of the assignee in insolvency to avoid executed contracts between the insolvent when in New York before any insolvency proceedings were begun and these non-resident plaintiffs in error, and to recover back the goods or their value, is repugnant to the constitution of the United States and void; and, as all these proceedings in the state courts depended on the validity of that authority, they do not constitute due process of law, and the decision of the state court sustaining the assignee's rights to sue is a construction of his authority (chap. 157 Mass. P.S.), and is repugnant to the fourteenth amendment to the constitution of the United States, and the judgment should be reversed.

Second Assignment.

"That in said suit there was drawn in question the validity of an authority exercised under the said state of Massachusetts as being repugnant to article 1, section 10, of the constitution of the United States, which was specially set up and claimed, and the decision was in favor of the validity of the authority drawn in question."

This error was called to the attention of the Superior Court by exception (Record, p. 53, line 15), and was before the Supreme Judicial Court without argument (Record, p. 63), and in assignments 2, 8, and 16 in the writ of error to the Supreme Judicial Court (Record, pp. 8, 10).

A.

The plaintiffs in error challenge the authority of the courts of Massachusetts to impair the obligation of a contract made outside of the state with a non-resident and to be performed outside of the state of Massachusetts, or by a judicial decision to enlarge the contract of employment they made with their attorneys, or to appoint an assignee in insolvency with authority to annul contracts by the insolvent with non-residents or to annul the judgments of courts of sister states.

They repeat here a portion of their brief filed with the Supreme Judicial Court of Massachusetts:

"The construction which must be given to the insolvency law of Massachusetts to support the judgment of the Superior Court is repugnant to article 1, section 10, of the constitution of the United States, relating to the impairment of the obligation of contract, which is set out as the sixteenth assignment of error.

"The plaintiffs in error, citizens of the state of New York, entered into a contract with McKeon; the delivery on the contract was made by the plaintiffs in error in New York, and the payment by McKeon was to be made in New York; the same is true of the contracts with the trustees.

"The operation of the law, as necessarily construed by the Superior Court in order to support the verdict and the judgment, impaired the obligation of contract in the following substantial particulars: —

"(*a*) It deprived the plaintiffs in error of their right to receive payment or satisfaction under their contract with McKeon.

"(*b*) It gave a third party, not in existence or contemplation at the time that the contract was made, the right to avoid the contract whereby merchandise was given by McKeon to the plaintiffs in error as security on a contract to be performed.

"(*c*) It avoided the contract made by the plaintiffs in error with McKeon in New York whereby the title to the merchandise was revested in him.

"(*d*) It impaired the obligations of the trustees' contract with the plaintiffs in error, whereby their debts were payable in New York.

"(c) It impaired the obligations of the contract of the plaintiffs in error with the trustees by assigning to the defendant in error the said contract and the plaintiffs in error right of action thereon without their consent and without jurisdiction over them to compel such assignment.

"'A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. Any law which releases a part of this obligation must, in the literal sense of the word, impair it.'

"Sturgis v. Crowninshield, 4 Wheat. 122, 197, 200, 203.
Ogden v. Saunders, 12 Wheat. 213.
Gilman v. Lockwood, 4 Wall. 409.
Baldwin v. Hale, 1 Wall. 223.
Watson v. Bourne, 10 Mass. 337.

"The theory upon which the process of foreign attachment is founded is, that a state has a right to seize the property of non-residents within its borders to pay debts due its citizens.

"It is submitted that a contract to pay money in another state is not property, but is a contract protected under the constitution of the United States, and that a state cannot interfere with its terms except it has jurisdiction over both parties. Further, an action by an assignee in insolvency, for an alleged preference, is not an action for a debt due to a citizen of the state. The assignee frequently being, and in this case as shown by record, a representative of non-residents as well as of citizens.

"The plaintiffs in error rest upon the broad ground that the state of Massachusetts could not impair McKeon's obligation to pay them; that a law imposing on them, being non-residents of the state, a penalty for collecting their debt is repugnant to article 1, section 10, of the constitution of the United States, and that a law allowing an assignee in insolvency to avoid or vary that contract is equally void. The property in dispute was removed from the limits of the state of Massachusetts before the proceedings of the Insolvency Court began, and before the Court

had taken possession of the insolvent's estate, and that terminated the jurisdiction of Massachusetts over it to arrest it or its proceeds for the benefit of creditors."

. . . "The contract was made outside the state, and as such was a valid and proper contract. The act done within the limits of the state, under the circumstances of this case, and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no power to prevent, at least with reference to the federal constitution. To deprive the citizen of such a right as herein described, without due process of law, is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the federal constitution the defendant had a right to perform. This does not in any way interfere with the acknowledged rights of the state to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such rights, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the federal constitution."

Allgeyer, v. La. 165 U.S. 578, 591.

The insolvency law as construed does not hold that the transactions between the plaintiffs in error and McKeon were void, but only voidable.

Burt v. Perkins, 9 Gray, 317, 320.
Snow v. Lane, 2 Allen, 18.

If the transaction was not absolutely void, so that no title could pass, then the state of Massachusetts could not appoint an officer and give him authority to avoid the title acquired by a non-resident.

B.

The common-law decisions of a state court are not rules of decision for a federal court.

Neither a statute nor a changed judicial construction of it or of the common law can be retroactive so as to increase the liability or scope or to diminish the rights under a contract entered into prior to it.

Gelpcke *v.* Dubuque, 1 Wall. 175, 206.

By the prior decisions of the Supreme Court of Massachusetts an attorney-at-law had not, by reason of his employment, authority to act for his principal, except in the cause for which he was retained; he could control the remedy, but could not prosecute or defend a suit for another cause.

Moulton *v.* Bowker, 115 Mass. 36.
Sartwell *v.* North, 144 Mass. 188.

The decision of the Supreme Court of Massachusetts that the attorneys in this case had authority, by reason of their employment, to change the cause of action is therefore repugnant to article 1, section 10, of the constitution of the United States.

C.

This assignment raises the authority of the Superior Court to interfere by the trustee process (chap. 183, P. S. Mass., Appendix D) with a contract with a non-resident made and payable outside of the state; and also the authority of the Court of Insolvency of Massachusetts under chap. 157, P. S. Mass., to appoint an officer with authority under the local law of Massachusetts to avoid contracts of an insolvent made in another state, and to recover the consideration paid the non-resident.

The Supreme Court of Massachusetts has decided that such contracts are subject to the local law relating to trustee process.

Sturtevant *v.* Robinson, 18 Pick. 175.

The Supreme Court of the United States has decided that they are not.

Wabash R.R. *v.* Tourville, 174 U.S. 322.

The principle supporting the federal decision is clearly set out by Massachusetts courts in other cases.

It is submitted that the authority assumed by the state court to change the party and the place of performance without the consent of the non-resident other party is an impairment of the obligations of contracts, and is repugnant to article 1, section 10, of the constitution of the United States.

Ogden *v.* Saunders, 12 Wheat. 213.
Sturgis *v.* Crowninshield, 4 Wheat. 122.
State Tax on Foreign Held Bonds, 15 Wall. 300, 320.

"The trustee process operates as a species of compulsory statute assignment.

"Strong *v.* Smith, 1 Met. 476.
McCarthy *v.* Propeller, 4 F. R. 818.
A. & P. R.R. Co. *v.* Hopkins, 94 U.S. 13.

"A discharge of that nature can only operate where the law is made by authority, common to the creditor and debtor, in all respects, where both are citizens or subjects.

"Watson *v.* Bourne, 10 Mass. 337.
Baker *v.* Wheaton, 5 Mass. 509.

"The right to attach necessarily implies the right to release the debtor, and that right is here asserted under the laws of a state which is not the state of the contract."

Ogden *v.* Saunders, 12 Wheat. 213, 365.

THIRD ASSIGNMENT.

"That in said suit there was drawn in question the validity of a statute of the state of Massachusetts, to wit, chapter 157 of the Public Statutes of Massachusetts, on the ground of its being repugnant, as construed to article 1, section 10, of the constitution of the United States, which was specially set up and claimed, and the decision was in favor of the validity of said statute of Massachusetts as construed."

This error was called to the attention of the Superior Court by exception (Record, p. 53, line 15), and was before the Supreme Judicial Court without argument (Record, p. 63), and in Assignment 16 of the writ of error to the Supreme Judicial Court. (Record, p. 10.)

The third assignment involves the validity of chap. 157, P. S. Mass., being the Insolvent Law of Massachusetts.

It is submitted that this law is void so far as by construction of the Supreme Court of the state it seeks to draw to it the contracts of non-residents who do not voluntarily appear in the Insolvency Court and submit to its jurisdiction; and so far as it seeks by sects. 97 and 99 (Appendix E) to hold non-residents liable to its penalties for collecting or securing the money due them from insolvent citizens of Massachusetts.

Such provisions, it is submitted, are repugnant to article 1, section 10, of the constitution of the United States.

Sturgis *v.* Crowninshield, 4 Wheat. 122.
Ogden *v.* Saunders, 12 Wheat. 213.
Gilman *v.* Lockwood, 4 Wall. 409.
Baldwin *v.* Hale, 1 Wall. 223, 234.
Savoye *v.* Marsh, 10 Met. 594, 595.
Pennoyer *v.* Neff, 95 U.S. 714, 720.

The principles and decisions are discussed somewhat in the first assignment of error. If the law as construed is invalid, then the authority exercised under it is unconstitutional and the procedure attempting to enforce it against a non-resident is not due process of law and all proceedings under it are a nullity.

Norton *v.* Shelby County, 118 U.S. 425, 442.

Fourth Assignment.

"That in said suit there was drawn in question the validity of statutes of the state of Massachusetts, — to wit, chaps. 164 and 183 of the Public Statutes of Massachusetts, — on the ground of their being repugnant, as construed, to article 1 of the fourteenth amendment to the constitution of the United States; which was specially set up and claimed in that, as enforced, it deprived these non-resident plaintiffs in error of their property without due process of law, and the decision was in favor of the validity of said statute of Massachusetts as construed."

This error was called to the attention of the Superior Court by exception (Record, p. 53, line 15), and was before the Supreme Judicial Court without argument (Record, p. 63), and in assignments 1, 2, 3, 4, 10, and 11 in the writ of error to the Supreme Judicial Court (Record, pp. 8, 9).

A.

The fourth assignment involves the validity of chap. 183, P.S. Mass. (Appendix D), relating to actions begun by trustee process as affected by chap. 164, P.S. Mass. (Appendix C), relating to actions against absent defendants, and as construed by the Supreme Court of Massachusetts. The plaintiffs in error submit that as construed they do not constitute due process of law as required by the fourteenth amendment to the constitution of the United States.

The construction given by the Supreme Court of Massachusetts is involved in the decision that a debt contracted and

payable in another state may be trusteed in Massachusetts. The Supreme Court of the United States has decided that this cannot be done.

Wabash R.R. *v.* Tourville, 179 U.S. 322.

If these debts were not trusteeable, as there was no service on the plaintiffs in error, nor any continuance for further service as specifically required by P.S. chap. 164, sect. 6 (Appendix C), and the docket does not show such continuance (Record, p. 60), then the writ died with the return term which ended the Saturday preceding the second Monday of June, and the Court had no jurisdiction.

P.S. Mass., chap. 152, sect. 17.
Acts 1885, chap. 384, sect 4.
P.S. Mass., chap. 164, sect. 6.
Fisher *v.* Cox, 16 L.T.N.S. 397.
Wilson, Pet'r, 131 U.S. 182.
Cooper *v.* Reynolds, 10 Wall. 308, 318.
Burlingame *v.* Cole, 13 Gray, 271.
Steen *v.* Norton, 45 Wis. 412.
Rindge *v.* Green, 52 Vt. 204, 209.
Lockett *v.* Rumbaugh, 45 F.R. 23.
Galpin *v.* Page, 18 Wall. 350.

As proceedings against absent defendants are on the borderland of excess of power, all requirements of the statute must be strictly followed, and it is not competent for a court of a state to waive in favor of its citizens any provision adopted for the benefit of a non-resident. If the plaintiff below did not comply with the statute it is his fault, and he cannot invoke an unconstitutional construction of the law in order to save himself from the result of his own neglect.

Thatcher *v.* Powell, 6 Wheat. 119, 127.
Lockett *v.* Rumbaugh, 45 F.R. 23.
Ogden *v.* Saunders, 12 Wheat. 213, 369.
Halsey *v.* Hurd, 6 McLean, 14.
Rindge *v.* Green, 52 Vt. 204, 209.
Steen *v.* Norton, 45 Wis. 412.

A discontinuance in the pleadings operates in law as a dismissal without a formal entry.

Encycl. Pl. & Pr., vol. 6, p. 961.

This is particularly true in actions under penal statutes.
Fisher *v.* McGirr, 1 Gray, 1, 35, 36.

B.

Further, it is urged that chap. 183 P.S. Mass. (Appendix D), as construed by the Supreme Court of Massachusetts, is void, as contravening the fourteenth amendment to the constitution of the United States, in that it assumes to bring in absent defendants charged with violating its local laws and subjecting their property to forfeiture under those laws.

All these propositions involve the common-law rights of non-residents, which cannot be taken away by local legislation, and in construing these rights the federal courts are not bound by state decisions.

Blake *v.* McClung, 172 U.S. 239.

The language of sects. 96 and 98 of chap. 157, P.S. Mass. (Appendix E), clearly defines the nature of the action authorized. No recovery can be had or forfeiture of share in estate be enforced except the defendant had an "intent" to evade, hinder, or impair the law, or to perpetrate a fraud on the law.

"Where the property neither does nor forbears doing anything, but the forfeiture is a mere penalty for an intent which reposes in the mind of its owner, then the question is one of criminal law."

Bishop on Criminal Law, sect. 703.

"The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal proceeding."

U. S. *v.* Choteau, 102 U.S. 603, 611.
Chaffee *v.* U. S., 18 Wall. 530, 538.

Massachusetts laws recognize that actions for forfeitures are local and not transitory.

P.S. Mass., chap. 161, sect. 11 (Appendix F).

A penalty means punishment, and involves jurisdiction over the culprit when the act was committed and over his body before it can be inflicted.

It is doubtful whether under the same circumstances the Supreme Judicial Court of Massachusetts would hold that under the state insolvent law these plaintiffs in error could have been imprisoned for having had an intent in New York to do a thing concerning a vested right under a contract made and to be performed in New York, even though that intent and that act reduced a fund that afterwards came into the hands of its courts to be administered. If this right to imprison is doubtful, we submit that the constitution of the United States protects our property equally with our persons, and that a right cannot exist to deal with the one in this case that might not authorize dealing with the other.

U. S. *v.* Lee, 106 U.S. 196, 218.

Hence we urge —

1. That no valid garnishment was made.

2. That no action was before the Court during the return term of the writ, which consequently died beyond power to revive.

3. That the action was for a penalty.

4. That on the record the plaintiffs in error were not subject to the law imposing the penalty.

5. That an action for a penalty could not be brought against the plaintiffs in error except by personal service.

6. That the foregoing are conclusions of constitutional law upon the facts shown in the record.

7. That the law of Massachusetts, P.S., chaps. 164 and 183, being construed by its highest court contrariwise, are void and invalid under the fourteenth amendment as to these non-resident plaintiffs in error.

As was said by this Court:

"The cardinal principles of justice are immutable. . . .

"Recognizing the difficulty in defining with exactness the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice."

Holden *v.* Hardy, 169 U.S. 366, 387, 390.

And as summarized by Judge Clark after reviewing the decisions of this Court:

"State action, to which the prohibitions of the fourteenth amendment extend, is not limited to a legislative enactment as it comes from the hands of the legislature, but extends to all instrumentalities and agencies officially employed in the execution of the law down to the point where the personal and property rights of the citizen are touched."

Nashville, C. & St. L. Ry. *v.* Taylor, 86 F.R. 168, 184.

FIFTH ASSIGNMENT.

"That in said suit the Superior Court of the State of Massachusetts decided, against the contention of the plaintiffs in error,

that it would not give full faith and credit to the judicial proceedings of the Supreme Court of the state of New York, as set forth in the evidence, as required by article 4, section 1, of the constitution of the United States of America, although their attention was drawn thereto, and thereby defeated the rights of these plaintiffs in error to relief."

This error was called to the attention of the Superior Court (Record, p. 53), and was before the Supreme Judicial Court without argument (Record, p. 63); and also by the seventeenth assignment of error argued before the Supreme Judicial Court. (Record, p. 10.)

A.

As said in the brief filed in the state court:

"The record shows that the plaintiff below introduced evidence to the Superior Court showing that after the goods in question reached New York McKeon followed; that his ownership was acknowledged in that state and the title revested in him; that the courts of New York having jurisdiction of the goods both by attachment and of McKeon, the owner, by personal service, took jurisdiction of the suit of the plaintiffs in error against McKeon, tried and determined the case, and ordered the goods sold; and that the plaintiff in error obtained title to the goods, the subject matter of the suit by the defendant in error, by virtue of a purchase of them at a judicial sale of them in the city of New York, by the sheriff of the county of New York.

"As the plaintiff below introduced this evidence (Record, pp. 36, 48, 53), he cannot object that the judicial proceedings in New York were not proved by properly authenticated records. With these facts admitted by the plaintiff below, the trial court erred in allowing the case to go to the jury, and thereby failed to give full faith and credit to the judicial proceedings of New York, as required by article 4, section 1, of the constitution of the United States.

"Hampton *v.* McConnell, 3 Wheat. 234, 235.
Green *v.* Van Buskirk, 5 Wall. 307, 311.
Green *v.* Van Buskirk, 7 Wall. 139, 148.

"The evidence introduced by the plaintiff below, showing the litigation and judicial sale in New York, is a complete bar to recovery here. In the matter of the restoration of the title to the merchandise to McKeon in New York, if any crime or offence was committed it must be tried in the courts of New York; if any liabilities were created they must be determined by the law of New York.

"Buchanan *v.* Drovers Nat. Bank, 6 U.S. Ap. 566, 579.
Milliken *v.* Pratt, 125 Mass. 374.
McIntyre *v.* Parks, 3 Met. 207."

B.

A bill of exceptions is a part of the record, and questions appearing in it are before the Court.

Estes *v.* Trabue, 128 U.S. 225, 228.
B. & P. R.R. *v.* Trustees, 91 U.S. 127, 130.

"The true test is not whether a federal question was presented, but whether such a question was decided, and decided adversely to the federal right. . . . Very little importance has been attached to the inquiry whether the federal question was formally raised."

Murray *v.* Charleston, 96 U.S. 432, 442.
Water Power Co. *v.* R.R. Co., 172 U.S. 475, 487.

It appears from the opinion of the Supreme Court of Massachusetts that the plaintiffs in error insisted on their constitutional rights (Record, p. 66), and this sufficiently raises the question.

Yazoo R.R. Co. *v.* Adams, 180 U.S. 1, 14, 15.

The remark in the opinion of the State Supreme Court, that the only proceedings in New York referred to in the case were suits to which the defendant in error was not a party, seems to be erroneous as a matter of law. The New York case was between Simon and Frank Rothschild, plaintiffs, and James McKeon, defendant (Record, p. 36). The Massachusetts proceedings were between Robert A. Knight . . . in his capacity as assignee in insolvency of James McKeon, plaintiff, and Simon and Frank Rothschild, defendants, and sundry persons as trustees merely. (Record, p. 20.)

Mr. Justice Story, in his "Conflict of Laws," section 412, states the law as follows: "Assignees in bankruptcy or insolvency are in the same situation as the bankrupt himself in regard to foreign debts. They take subject to every equity belonging to foreign creditors."

And Massachusetts courts have stated the same principle as to domestic creditors.

Pratt *v.* Wheeler, 6 Gray, 520, 523.

Consequently, while Knight, assignee, was not a party to the New York suit, he is a privy to it and bound by it.

So close is this privity that Massachusetts courts have held that an assignee in insolvency might bring a writ of error to reverse a judgment against his insolvent.

Johnson *v.* Thaxter, 7 Gray, 242.
Johnson *v.* Thaxter, 12 Gray, 198.

The addition of trustees did not change the status of the parties; the pleadings show the only controversy being litigated was between the same parties, plaintiff and defendant, in both actions, and that the claim sued for in Massachusetts was for the identical goods attached in New York, and there sold under judicial decree to satisfy a debt due to the plaintiffs in error. (Record, pp. 36, 37, 41, 53, 16.)

While a judgment of the court of a sister state must under the constitution and laws of the United States be given full faith and credit if proved as provided by federal law, such method of proof is not exclusive; and if the laws or practice of a state permit other proof, and such proof is admitted, the judgment is equally entitled to full faith and credit.

Raynham *v.* Canton, 3 Pick. 293, 295.
Capen *v.* Emery, 5 Met. 436.
Kingman *v.* Cowles, 103 Mass. 283.
Brainard *v.* Fowler, 119 Mass. 262, 265.
Kean *v.* Rice, 12 S. & R. (Pa.) 203, 208.
Biddis *v.* James, 6 Binn, 321, 326.
Ex parte Powell, 3 Leigh. 816, 817.

The evidence of the New York proceedings being introduced by the plaintiff below, it was an admission by him and dispensed with other proof. The rule is stated in Comm. *v.* Desmond, 5 Gray, 80, 82: "Admissions made in the course of judicial proceedings are substitutes for and dispense with the actual proof of facts."

The same rule has been established by the federal courts.

Oscanyan *v.* Arms Co., 103 U.S. 263.
Ritchie *v.* McMullen, 159 U.S. 235.

And in so far as the evidence relating to the New York proceedings was oral, it being uncontroverted, it must be taken to be true.

The "Silver Moon," F.C. 12,856.
U. S. *v.* Chaffee, F.C. 14,774.
McNair *v.* McLennan, 24 Pa. St. 384, 385.

These admissions and this evidence being before the Court without objection or limitation were entitled to their full probative effect.

Damon *v.* Carroll, 163 Mass. 404, 407.

The federal courts hold that evidence of the subject-matter, of the action upon it, that the judicial power arose, and that it was exercised, is sufficient to establish the validity of a judgment.

Simmons *v.* Paul, 138 U.S. 454.

The Massachusetts courts have held that the requisite evidence must show the subject-matter, the jurisdiction, and the judgment.

Knapp *v.* Abell, 10 Allen, 485, 488.

The admissions and evidence in this case show that there was before the state court uncontroverted evidence of the subject-matter of the suit in New York (Record, p. 35), the action upon it is shown (Record, pp. 37, 41, 45, 53), the jurisdiction is shown to have arisen by attachment and personal service of summons in New York (Record, pp. 37, 41, 45, 53), and the exercise of the judicial power by sale is shown on pages 41, 45, and 53 of the record.

These admissions and this uncontroverted evidence sufficiently establish the New York proceedings under both the federal and state rules.

Under this showing of facts the state court should have followed the uninterrupted run of decisions of this Court that "the judgments of a state court should have the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced."

Hampton *v.* McConnell, 3 Wheat. 234, 235.
Huntington *v.* Attrill, 146 U.S. 657.

The theory of the trial court was that an offence had been committed against the insolvency laws of Massachusetts, that the liability arose from that offence, and that it was immaterial what became of the goods afterward, and instructed the jury to disregard the judicial proceedings in New York.

Counsel have already argued that the plaintiffs in error as non-residents owed no duty to the state insolvent law, and were not bound by it; that they had a right to take their pay when and where they could get it; that that right existed at any time before insolvency as well as at any time after insolvency, and that so far as non-residents are concerned the state power is limited to taking possession of the insolvent's goods within its jurisdiction and distributing them. If this is true, as counsel assumes it to be, the judgment in New York was of vital effect and could not be attacked or reviewed on its merits by the courts of any other state. Until the Insolvency Court of the state of Massachusetts took possession of McKeon's goods he could ship them to anyone within or without the state, and, being lawfully in another state, the jurisdiction of Massachusetts over them was divested, and the laws of that other state alone governed the further acquisition of title to them, and the judicial sale of them carried with it a title clear of all liability for their value to the whole world.

Green *v.* Van Buskirk, 5 Wall. 307, 311.
Green *v.* Van Buskirk, 7 Wall. 139, 148.

The plaintiffs in error submit that on the authority of the prior decisions of this Court the insolvency law of Massachusetts in inflicting penalties and forfeitures and impairing contracts must be strictly limited to residents owing allegiance to the state and bound by its laws.

That the courts of Massachusetts failed to give full faith and credit to the judicial proceedings of the courts of New York when they ignored such proceedings fully admitted by the plaintiff below.

That the procedure in the courts below did not constitute due process of law.

Therefore the judgment of the Superior Court of Massachusetts should be reversed.

HARRY J. JAQUITH,
THOMAS J. BARRY,
Counsel for Plaintiffs in Error.

APPENDIX.

A.

Chap. 187, P.S. Mass., Writs of Error:

"SECTION 1. Writs of error in civil and criminal cases may issue, of course, out of the Supreme Judicial Court in vacation as well as in term time, and shall be returnable to the same court.

"SECT. 2. Questions of law (except upon pleas in abatement) and final judgments in civil actions in the Superior Court may be re-examined upon a writ of error, and reversed or affirmed, in the Supreme Judicial Court held for the same county, for any error in law or in fact, except as hereinafter provided. When the judgment is reversed the court shall render such judgment as the Superior Court should have rendered.

"SECT. 3. A judgment in a civil action shall not be arrested or reversed for a defect or imperfection in form which might by law have been amended; nor by reason of a mistake respecting the venue of the action; nor because the judgment is not in conformity with the allegations of the parties, if it is in conformity with the verdict; nor shall any error in law in a civil action in which the defendant appeared and a verdict was rendered, except such as occurs after verdict, be assigned in a writ of error. But nothing herein contained shall prevent either party from assigning an error affecting the jurisdiction of the court."

B.

Chap. 153, sect. 8, P.S. Mass., Supreme Judicial and Superior Courts: "Decisions of a justice of either court, upon pleas in abatement or on motions to dismiss for defect of form in process, shall be final on the question raised. On motions for a new trial, and in all cases, civil or criminal, whether according to the course of the common law or otherwise, a party aggrieved by an opinion, ruling, direction, or judgment of the court in

matters of law may allege exceptions thereto, and shall not be required in a jury trial to allege the same in writing before the jury retires to consider the cause. Such exceptions, being reduced to writing in a summary mode, shall be filed with the clerk, and notice thereof given to the adverse party before the adjournment without day of the term in which the exceptions are taken, and within three days after the verdict in the case, or after the opinion, ruling, direction, or judgment excepted to is given. For good cause shown, a further time, not exceeding five days, unless by consent of the adverse party, may be allowed by the court. The clerk immediately, on the filing of the exceptions, shall present them to the court. The exceptions being examined and found conformable to the truth shall be allowed by the presiding judge. In all cases the adverse party shall have an opportunity to be heard concerning the allowance of such exceptions."

C.

Chap. 164, P. S. Mass., Absent Defendants:

"SECTION 1. No personal action shall be maintained against a person who is out of the commonwealth at the time of the service of the summons, unless he had before that time been an inhabitant of the commonwealth, or unless an effectual attachment of his goods, estate, or effects is made on the original writ, except in cases in which it is otherwise specially provided.

"SECT. 6. If a defendant is absent from the commonwealth, or his place of residence is not known to the officer serving a writ, and no personal service is made on him, or if the service of a writ is defective or insufficient by reason of mistake on the part of the plaintiff or officer as to the place where or the person with whom the summons or copy ought to have been left, the court upon suggestion thereof by the plaintiff shall order the action to be continued from term to term until notice of the suit is given in such manner as the court may direct. In any case in which the defendant does not appear, the court may in its discretion order the action to be continued and further notice given to him in such manner as the court may direct."

Chap. 384, Acts of 1885:

"SECTION 2. The courts respectively shall be always open in every county, and there shall no longer be any terms thereof. Any business of the courts or the justices thereof respectively may be transacted at any time; but no such business shall be transacted on Sunday, except in respect of such applications as, in the opinion of the court or justice to whom the same may be made, shall be of pressing necessity. Sittings of the courts respectively shall be held as heretofore at the times and places appointed by the laws now in force for holding terms of the courts.

"SECT. 4. Whenever the terms of the courts respectively are referred to in any statute of this state for any purpose not otherwise herein provided for, such terms shall for the purposes of such statute be considered as commencing on the day appointed by law for the commencement of the regular sittings of the court and as ending on the day preceding the next such sittings."

D.

Chap. 183, P.S. Mass., Trustee Process:

"SECTION 3. When the action is brought in the Supreme Judicial Court or Superior Court, if all the persons named as trustee in the writ dwell or have usual places of business in one county, the writ shall be returnable in such county, otherwise it may be returnable in any county in which either of them dwells or has his usual place of business, without regard to the domicile of the other parties.

"SECT. 21. When a person who is summoned as trustee has goods, effects, or credits of the defendant intrusted or deposited in his hands or possession, such goods, effects, and credits shall be thereby attached and held to respond to the final judgment in the suit, in like manner as goods or estate attached by the ordinary process, except as hereinafter provided.

"SECT. 25. Any money or other thing due to the defendant may be attached, as herein mentioned, before it has become payable, if it is due absolutely and without any contingency; but the trustee shall not be compelled to pay or deliver it before the time appointed by the contract."

E.

Chap. 157, P.S. Mass., Insolvency Courts:

"SECTION 27. If it appears that there has been mutual credit given by the debtor and any other person, or mutual debts between them, the account between them shall be stated, and one debt set off against the other, and the balance shall be allowed or paid on either side.

"SECT. 33. A person who has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this chapter, shall not prove the debt or claim on account of which the preference was made or given, nor receive any dividend thereon.

"SECT. 96. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the petition by or against him, with a view to give a preference to a creditor or person who has a claim against him, or is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, having reasonable cause to believe such person is insolvent or in contemplation of insolvency, and that such payment, pledge, assignment, or conveyance is made in fraud of the laws relating to insolvency, the same shall be void, and the assignee may recover the property or the value of it from the person so receiving it or so to be benefited.

"SECT. 98. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the petition by or against him, makes a sale, assignment, transfer, or other conveyance of any description of any part of his property to a person who then has reasonable cause to believe him to be insolvent or in contemplation of insolvency, and that such sale, assignment, transfer, or other conveyance is made with a view to prevent the property from coming to his assignee in insolvency, or to prevent the same from being distributed under the

laws relating to insolvency, or to defeat the object of, or in any way to impair, hinder, impede, or delay the operation or effect of, or to evade, any of said provisions, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property or the value thereof as assets of the insolvency. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be *prima facie* evidence of such cause of belief."

F.

Chap. 161, P.S. Mass., Venue of Actions:

"SECTION 11. Every civil action for the recovery of a forfeiture (except actions in which the commonwealth is plaintiff and actions brought to recover money for the commonwealth) shall be brought in the county in which the offence was committed, unless a different provision is made in the statute imposing the forfeiture."

No. 108

By a Pro. Error

SUPREME COURT OF THE UNITED STATES

Writ of Error to Appeal

OCTOBER TERM, 1901.

No. 108.

SIMON ROTHSCHILD et al.,

Plaintiffs in Error

vs.

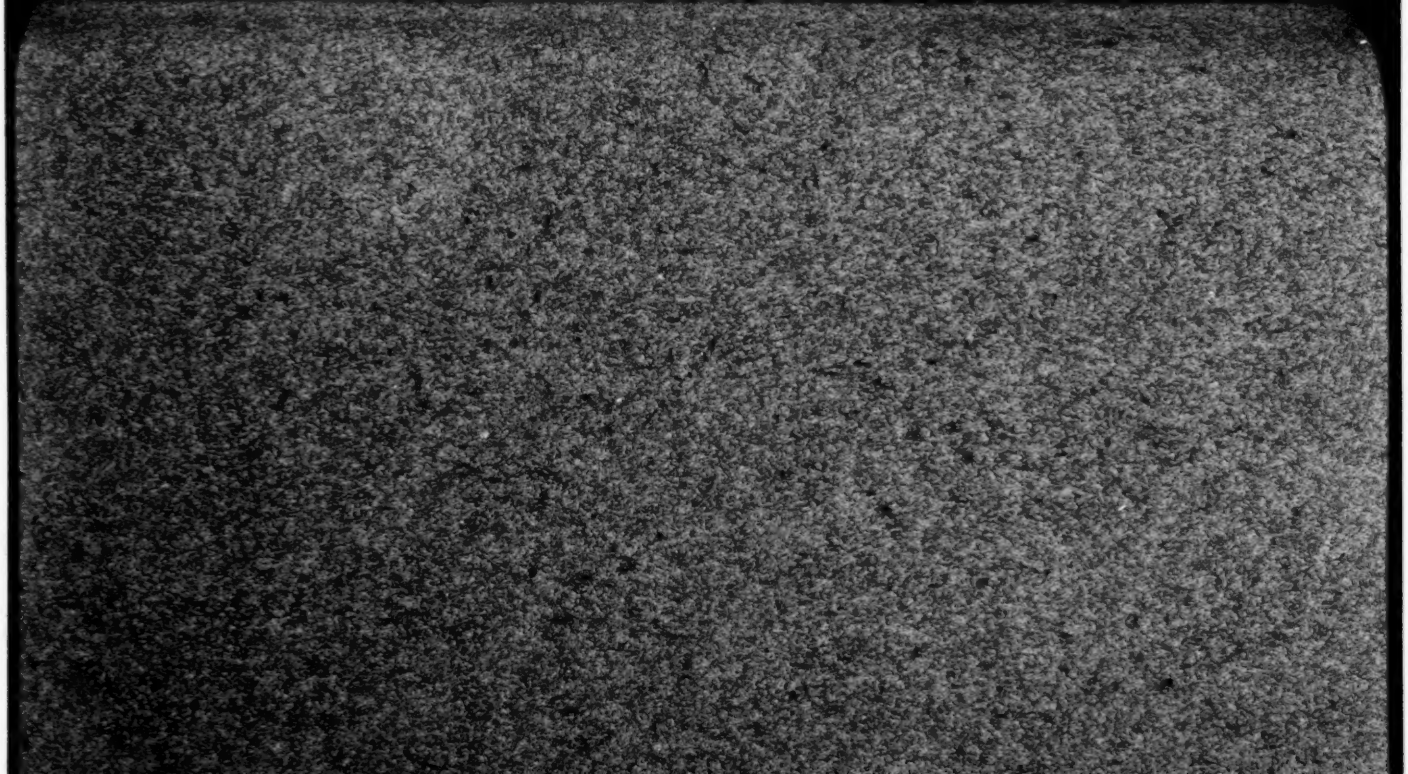
ROBERT A. KNIGHT,

Assignee in Insolvency of James McKeon.

BRIEF FOR DEFENDANT ON DEFENDANT'S MOTION TO DISMISS OR AFFIRM.

Submitted October 21, 1901.

CHARLES M. RICE,
ROBERT A. KNIGHT.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 108.

SIMON ROTHSCHILD ET AL., PLAINTIFFS IN ERROR,

vs.

ROBERT A. KNIGHT, ASSIGNEE IN INSOLVENCY OF JAMES McKEON, DEFENDANT.

BRIEF FOR DEFENDANT ON DEFENDANT'S MOTION TO DISMISS OR AFFIRM.

STATEMENT OF FACTS.

This is a writ of error to the Superior Court of Massachusetts. The original action in said Superior Court was an action of tort by the defendant, who was and is the assignee in insolvency of one McKeon, to recover the value of goods alleged to have been conveyed by McKeon to the plaintiffs in error (there the defendants) in fraud of the insolvency laws of Massachusetts. The answer was a general denial. The defendant in error (there the plaintiff) had a verdict, and the case was taken by the plaintiffs in error (there the defendants) on exceptions, to the Supreme Court of Massachusetts.

[Record, pp. 14, 16-18, 21-3, 25-63.]

No Federal questions were raised by the pleadings or otherwise in the Superior Court, or by said exceptions.

Said exceptions were overruled by the Supreme Court.

[Record, p. 63.]

The present plaintiffs in error, then, *after the final judgment* rendered in the Superior Court, March 6, 1899 [Record, pp. 54, 56], brought a writ of error to the said Superior Court in the Supreme Court of Massachusetts.

[Record, pp. 6, 7-13.]

Some of the assignments of error accompanying said writ of error alleged infringements of the rights of the plaintiffs in error under the fourteenth amendment of the Constitution of the United States, but it is submitted, and will be argued hereafter, that Federal questions were raised then for the *first time*, and when it was *too late*, and, moreover, that said assignments of error are not part of the Record in this case, and cannot here be considered at all, and cannot therefore give this Court jurisdiction in the present case.

[Record, pp. 8-9, 60-1.]

The writ of error brought as aforesaid in the Supreme Court of Massachusetts was heard by a single justice thereof, and reported to the full bench.

[Record, pp. 2-5.]

where the judgment in the Superior Court was affirmed.

[Record, pp. 63-6.]

The present writ of error was then brought *to the Superior Court* of the State of Massachusetts in this Supreme Court of the United States, and an assignment of errors filed therewith.

[Record, pp. 1-2, 60-1.]

POINTS AND AUTHORITIES.

The Motion to Dismiss.

I.

No Federal questions were ever raised in the Superior Court, or on exceptions, or until after the final judgment in

the Superior Court of Massachusetts, and such questions could not, after said final judgment, be then raised for the first time, so as to authorize this Court to review the decision of said Superior Court.

The following cases support the above proposition as a matter of law:

TURNER VS. RICHARDSON, 180 U. S. 87 (91-2).
SCUDDER VS. COMPTROLLER of N. Y., 175 U. S. 32 (36).
CITIZENS' SAV. BANK VS. OWENSBORO, 173 U. S. 636 (643).
MEYER VS. RICHMOND, 172 U. S. 82 (92.)
CALIFORNIA NAT. BK. VS. THOMAS, 171 U. S. 441 (446).
FOWLER VS. LAMSON, 164 U. S. 252 (255).
TEXAS &C. R. CO. VS. S. PACIFIC CO., 137 U. S. 48 (53).
LOEBER VS. SCHROEDER, 149 U. S. 580 (585).
BUSHNELL VS. C. M. CO., 148 U. S. 682 (689).
LEEPER VS. TEXAS, 139 U. S. 462 (467-8).

A.

That no Federal questions were ever raised, or intended to be raised, in the case in the Superior Court, or on the exceptions taken to the Supreme Court of Massachusetts, will be clear from an inspection of the Record:

a. See the original pleadings. [Record, pp. 16-8, 21-3.] The answer was merely a general denial [Record p. 22], and no Federal question was raised.

b. See the exceptions taken by plaintiffs in error (there the defendants). All these exceptions but one were confined merely to objections to the admission of evidence, said exceptions being:

(1) As to the admissibility of the testimony of Lillian Dietz, employed by McKeon, in regard to the value of the goods in question, to which testimony plaintiffs in error objected on

the ground she was not qualified to give her opinion as to value. [Record, p. 33];

(2) As to the admissibility of the testimony of the present defendant in error as to the fair value of the accounts on McKeon's books against his customers. [Record, p. 34];

(3) As to the admissibility in evidence of affidavits of Simon Rothschild and B. F. Einstein and Frank Rothschild, Jr. [Record, pp. 34, 37, 40];

(4) As to the admissibility of testimony of present defendant in error regarding a conversation in New York between himself and Frank Rothschild, Jr., the general agent of plaintiffs in error, wherein he stated that Rothschild offered him the dividend which would come to plaintiffs in error, if their claim was proved in the Massachusetts Insolvency Court, if he would drop the suit in the Superior Court. [Record, p. 49];

(5) As to request of present plaintiffs in error, when all the evidence was in, that the court would rule "that there was no evidence to warrant the finding that McKeon intended to prefer them (there the defendants), or intended to prevent the property from coming into the possession of the assignee, or from being distributed according to the laws relating to insolvency, and that the action could not be maintained." [Record, p. 53.]

In all these exceptions, no Federal questions were raised, or intended to be raised, as is evident from an inspection of them. Only exceptions (1) and (3) [above] were argued. [See c. below.]

c. See the opinion of the Supreme Court in passing upon the exceptions. [Record, pp. 62-3.]

Only the exceptions relating to the testimony of the witness Dietz, and the admissibility of the affidavits were argued [See (1) and (3) above], as is stated by the court.

Here, also, there is no trace of any Federal question.

As to Federal questions, what they must be and how raised, see

WATER POWER CO. vs. ST. R. Co., 172 U. S. 475 (488).

B.

Final judgment was rendered in the Superior Court March 6, 1899 [Record, pp. 54, 56], and subsequently on April 25, 1899, the present plaintiffs in error brought the writ of error to the Massachusetts Supreme Court. [Record, p. 6.]

It does not even appear from the Record that any bond was filed with said writ of error; which, if filed, might operate as a *supersedeas* upon execution under said judgment. [See Mass. Public Statutes, c. 187, Sect. 5.]

It is, therefore, respectfully submitted that, under the above considerations, the proposition stated under I (above) is applicable to the case at bar, and of itself conclusively shows that no Federal questions were ever raised in time to authorize this Court to review said decision of the Superior Court of the State of Massachusetts, and the present writ of error must be dismissed.

II.

The proceedings under the writ of error to the Superior Court, brought in the Massachusetts Supreme Court [see Record pp. 2-13, 63-6] are not properly a part of the present Record in the case, and will not be considered by this court under the present writ of error to said Superior Court. Hence the true Record shows no Federal questions ever raised before they were raised in this Court by the present assignment of errors [Record, pp. 60-1], and the proposition stated under I above applies to the present case a fortiori.

A.

It is respectfully submitted that, in a writ of error from this court to the *Superior Court* of the State of Massachusetts, which is the present case, proceedings under the writ of error which was brought in the *Supreme Court* of Massachusetts, cannot be considered. Such proceedings could only be

considered under a writ of error from this court to the *Supreme Court* of Massachusetts.

For, in order to give this Court jurisdiction of this writ of error to the Superior Court of Massachusetts, it must appear affirmatively that a Federal question was presented for decision by said Superior Court.

WATER POWER CO. VS. ST R. CO., 172 U. S. 475 (488).
EUSTIS VS. BOLLES, 150 U. S. 361 (366).
HARRISON VS. MORTON, 171 U. S. 38 (47).
MO. PAC. R. VS. FITZGERALD, 160 U. S. 556 (576).
FOWLER VS. LAMSON, 164 U. S. 252 (255).
CAL. POWDER WKS. VS. DAVIS, 151 U. S. 389 (393).
COOK CO. VS C. & C. CANAL & D. CO., 138 U. S. 635 (651).

But as shown under I (above) it does not appear that any Federal questions were raised, or attempted to be raised, by the exceptions taken in said Superior Court, or previously in the trial of the case, or until after final judgment, and the assignment of errors which was filed in the Massachusetts Supreme Court [see Record, pp. 8-9] under the writ of error brought in *that* court is immaterial, and cannot here be considered as a part of the Record, under the above rule which said decisions establish.

The assignment of errors in the present case [see Record, pp. 60-1] is an attempt to inject into the Record *Federal questions not lawfully found therein.*

See CITIZENS' SAV. BANK VS. OWENSBORO, 173 U. S. 636 (643).

B.

None of the questions raised in the assignment of errors accompanying the said writ of error brought in the Massachusetts Supreme Court will be considered at all by this Court, since, for the reasonsstated above (II, A), said assignment of errors, though printed at pages 8-9 of the Transcript of the Record, is not properly a part of the *true Record.*

The Record is the sole guide.

This Court, for the purpose of examining the case, will depend solely upon the true Record of the Superior Court of the

State of Massachusetts, and *anything not properly a part of this Record will not be considered.*

WARFIELD VS. CHAFFE, 91 U. S. 690 (692).
REDFIELD VS. Y. I. CO., 110 U. S. 174 (176).
STRUTHERS VS. DREXEL, 122 U. S. 487 (491).
RED RIVER CO. VS. SULLY, 144 U. S. 209.
UNITED STATES VS. TAYLOR, 174 U. S. 695 (700).

and see:

OCEAN INS. CO. VS. POLLEYS, 13 Pet. 157 (165).
INGLEE VS. COOLIDGE, 2 Wheat. 363 (368).
LESSEES OF FISHER VS. COCKERELL, 5 Pet. 248 (254-259).
Speare on the Law of the Federal Judiciary, pp. 547-8.

C.

But even if said assignment of errors could be taken into consideration, the errors set forth, so far as relating to Federal questions, are in too general a form to properly raise a Federal question. [Record, pp. 8-10.]

CLARK VS. MCDADE, 165 U. S. 168 (172–3).

III.

CONCLUSION.

It is therefore respectfully submitted that this Court has no jurisdiction of the present writ of error, since the Record shows (1) that no Federal questions were ever raised until after final judgment in the Superior Court, and (2) that the true Record shows no Federal questions ever raised even till the assignment of errors in this Court [Record, pp. 60-1] since, as shown under II, the assignment of errors filed in the Massachusetts Supreme Court [Record, pp. 8-9], and the other proceedings under the writ of error brought in that court, will not be here considered as a part of the Record before this Court in considering the present writ of error.

The motion to dismiss, therefore, ought to be granted.

IV.

The Motion to Affirm.

If the motion to dismiss be not granted, and if it be held that the proceedings under the writ of error brought in the Massachusetts Supreme Court (Record, pp. 2-14, 63-6) can be considered as a part of the true Record now before this Court for consideration in the present case, then, although the Record may show that this Court has jurisdiction, yet it is manifest that the question on which jurisdiction depends is so frivolous as not to need further argument.

Although "further argument" is alleged unnecessary in the motion above referred to, yet it may not be improper to direct the attention of the Court, if the defendant may be permitted to do so, in a very few words to a few points appearing in the Record which clearly seem to justify the affirmance of the judgment. They are as follows:

1. As to the first assignment of error, Record, p. 61, any grounds for Federal questions raised below are removed by the findings of fact of the Massachusetts Supreme Court, as to the attachment, and the appearance of, and service upon present plaintiffs in error. [Record pp. 2-4, and 64-6.]

See Egan vs. Hart, 165 U. S. 188 (189).

2. There was no question raised below that Massachusetts had passed any law impairing the obligation of contract [see second assignment of error, Record, p. 61], but merely that the "*judgment*" would do so [Record, p. 10], which raises no Federal question.

N. O. Waterworks vs. L. S. Co., 125 U. S. 18 (30).

3. There were in fact no such questions raised below at all, as attempted to be raised by assignments of error Nos. 3 and 4. [Record, p. 61.] The validity of no statutes was drawn in question.

4. There was no judgment of the New York Supreme Court put in evidence [see assignment of error No. 5, Record, p. 61]. See Record and opinion of the Massachusetts Supreme Court [Record, p. 66].

Respectfully submitted,

CHARLES M. RICE,
ROBERT A. KNIGHT,

for Defendant.

No. 108.

Brief of Plaintiffs in Error

SUPREME COURT OF THE UNITED STATES.

Filed Oct. 31, 1901

OCTOBER TERM, 1901.

No. 108.

SIMON ROTHSCHILD et al.,

Plaintiffs in Error,

vs.

ROBERT A. KNIGHT,

Assignee in Insolvency of James McKeon.

BRIEF FOR DEFENDANT.

CHARLES M. HOE,

ROBERT A. KNIGHT,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 108.

SIMON ROTHSCHILD ET AL., PLAINTIFFS IN ERROR,

vs.

ROBERT A. KNIGHT, ASSIGNEE IN INSOLVENCY OF JAMES McKEON, DEFENDANT.

BRIEF FOR DEFENDANT.

STATEMENT OF THE CASE.

This is a writ of error to the Superior Court of Massachusetts. The original action in said Superior Court was an action of tort by the defendant, who was and is the assignee in insolvency of one McKeon of Springfield, Mass., to recover the value of goods alleged to have been conveyed by McKeon, when insolvent, to the plaintiffs in error (there the defendants), both of New York, in fraud of the insolvency laws of Massachusetts. The answer was a general denial. The defendant in error (there the plaintiff) had a verdict, and the case was taken by the plaintiffs in error (there the defendants) on exceptions, to the Supreme Court of Massachusetts.

[Record, pp. 14, 16-18, 21-3, 25-63.]

No Federal questions were raised by the pleadings or otherwise in the Superior Court, or by said exceptions.

Said exceptions were overruled by the Supreme Court.

[Record, p. 63.]

The present plaintiffs in error, then, *after the final judgment* rendered in the Superior Court, March 6, 1899 [Record, pp. 16, 54, 56], brought a writ of error to the said Superior Court in the Supreme Court of Massachusetts.

[Record, pp. 6, 7-13.]

No Federal questions in the Courts below appear anywhere else in the Record, except in the assignment of errors filed in said Supreme Court, and except as referred to in its opinion.

[Record, pp. 8-9, 63-6.]

The writ of error brought as aforesaid in the Supreme Court of Massachusetts was heard by a single justice thereof, and reported to the full bench,

[Record, pp. 2-5.]

where the judgment in the Superior Court was affirmed.

[Record, pp. 63-6.]

The present writ of error was then brought *to the Superior Court* of the State of Massachusetts in this Supreme Court of the United States, and an assignment of errors filed therewith.

[Record, pp. 1-2, 60-1.]

(1)

The original case of Knight, Assignee, vs. Rothschild, in the Superior Court.

[For reference.]

The sections of the insolvency laws of Massachusetts under which the action was originally brought in the Superior Court of Massachusetts, are sections 96 and 98 of Chapter 157 of the Massachusetts Public Statutes, and are as follows:

"Sect. 96. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the

petition by or against him, with a view to give a preference to a creditor or person who has a claim against him, or is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, having reasonable cause to believe such person is insolvent or in contemplation of insolvency, and that such payment, pledge, assignment, or conveyance is made in fraud of the laws relating to insolvency, the same shall be void; and the assignee may recover the property or the value of it from the person so receiving it or so to be benefited."

"Sect. 98. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the petition by or against him, makes a sale, assignment, transfer or other conveyance of any description of any part of his property to a person who then has reasonable cause to believe him to be insolvent or in contemplation of insolvency, and that such sale, assignment, transfer, or other conveyance is made with a view to prevent the property from coming to his assignee in insolvency, or to prevent the same from being distributed under the laws relating to insolvency, or to defeat the object of, or in any way to impair, hinder, impede, or delay the operation and effect of, or to evade, any of said provisions, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property or the value thereof as assets of the insolvency. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be *prima facie* evidence of such cause of belief."

The plaintiff's declaration was in three counts:

(1) The first count was general, stating that defendant owed plaintiff $6,477.50 for goods delivered by the insolvent debtor to defendants according to an annexed schedule. [Record, pp. 16-7.]

(2) The second count (as amended) was framed so as to recover, as assignee, the value of the same goods described in the

schedule referred to in Count 1 (above) under Section 98 of the Mass. Public Statutes (see above) [Record, pp. 21-3].

(3) The third count was framed so as to recover, as assignee, the value of the same goods as referred to under Counts 1 and 2 (above) under Section 96 of the Mass. Public Statutes (see above) [Record, p. 23].

The defendant's answer was a general denial [Record, p. 22].

A.

The Facts in the Original Case.

In the original trial in the Superior Court the facts, as shown in the bill of exceptions [Record, pp. 25-53], briefly, were as follows:

The goods whose value was sought to be recovered by the assignee were a quantity of fur garments conveyed and delivered by McKeon to plaintiffs in error (there the defendants) on December 20, 1895. McKeon was adjudged an insolvent, and the present defendant (there the plaintiff) was chosen assignee of his estate within six months of said time of conveyance of said goods, to wit, on February 20, 1896.

[Record, p. 25.]

On December 19, 1895, McKeon owed the then defendants (here the plaintiffs in error) $3,865 for goods sold, which debt was overdue, and on that day Frank Rothschild, Jr., son of Simon Rothschild, one of said defendants, he being the general agent of said defendants with full power and authority, came to Springfield to see McKeon; previously he had been unable to collect the bill from McKeon, though he had seen and corresponded with McKeon, and had asked him to remit several times;

[Record, pp. 38-9, 47.]

he was unable to find McKeon on that day, though he called eight or ten times, but on the next day he had a con-

ference at the Haynes House with McKeon, there also being present Edward H. Lathrop, who was McKeon's counsel, and C. C. Spellman, Esq., retained by Rothschild in the interest of said defendants.

As to the conversation that took place at the meeting above alluded to, see

Testimony of Lathrop, Exeep., Record, pp. 25-30.
Affidavit of F. Rothschild, Jr., Record, pp. 46-8.
Deposition of F. Rothschild, Jr., Record, 48-9.

McKeon was embarrassed [Record, pp. 29, 31]; Lathrop knew it [Record, p. 29], and he had told McKeon a day or two before that he was insolvent [Record, p. 29].

It will be seen from Lathrop's testimony that Rothschild knew that McKeon was in difficulty, and that Lathrop, besides, there told him and McKeon that McKeon was legally insolvent, and he knew it, and Rothschild knew it [Record, p. 26, 29], and taking any goods out of his stock under those circumstances would be in violation of the Massachusetts insolvent laws, which allowed no preferences [Record, pp. 26, 43, 40-1]; also, from affidavit and deposition of Rothschild, it appears that he said he would assist McKeon if he would secure said defendant's claim [Record, pp. 47-8], or pay it in full [Record, pp. 39-40]; it appears from Rothschild's own testimony [Record, pp. 39, 40, 43] that Rothschild said he was "sorry McKeon was in an embarrassed condition and was willing to help him. I said, of course, one of the conditions would be that he would *pay our claim in full*," and he adds that Lathrop then told him that under the laws of Massachusetts a preference couldn't be created. Lathrop explained to them the Massachusetts insolvency law [Record, pp. 26, 40-1, 43]. Lathrop testified Rothschild wasn't to advance any money *unless he got the property* [Record, p. 28]. Lathrop opposed the proposition. Lathrop withdrew before the conference ended [Record, p. 29]. He said no favor should be shown Rothschild, though he should help McKeon, that it must not be done. [Record, pp. 27-8, 43, 40-1.]

The affidavit of Einstein, attorney of said defendants [Record, pp. 36-7], which is stated to be true by the admission of S. Rothschild, one of said defendants, in his affidavit [Record, p. 35] also showed that McKeon was insolvent, that

said defendants had reasonable cause to believe he was insolvent, and that the goods were delivered as a preference. [See Record, p. 63.]

On the same day, December 20, 1895, McKeon packed the goods, whose value this suit is brought to recover, in three trunks and shipped them to New York, giving bill of the goods and the trunk checks to Rothschild, who went back to New York that night. McKeon told him he "had better mark the bill paid," and he did. [Record, pp. 30, 40, 51-52, 46.]

Immediately on arriving in New York the goods were taken to said defendants' storehouse. [Record, pp. 45.]

F. Rothschild, Jr., testified that the next day the goods were attached in New York in a suit brought in New York against McKeon by said defendants, S. Rothschild & Bro., then replevied by another party, Cohen & Bro., and sold at a sheriff's sale [Record, pp. 37, 41], at which said defendants bought them all. [Record, p. 45.]

Before Frank Rothschild, Jr., left Springfield on December 20, 1895, he, as he testified, gave McKeon a check for $100, for McKeon to make a part payment of a claim against him in the hands of a Springfield attorney, one Carpenter; but defendants never advanced any more money to McKeon or for him to anyone after December 20, 1895 [Record, pp. 45-6], nor did McKeon ever pay Carpenter anything on the claim. [Record, p. 30.]

[The foregoing abstract of the facts appearing in the bill of exceptions in the original case is inserted for reference. It is not believed that these facts enter into the discussion under the present writ of error or concern the questions of law here arising; but it was thought proper to insert such an abstract, in order that the history of the case from the beginning might here appear in a complete form, and be easily understood.]

(2)

The writ of error (Rothschild et al. vs. Knight, Assignee) in the Supreme Court of Massachusetts.

After the exceptions in the original case were overruled [Record, pp. 54, 62-3], the defendants therein brought a writ of error in the Massachusetts Supreme Court, and alleged assignments of error found on pages 8-10 of the Record, which will be hereafter referred to in this brief.

It is only in this assignment of errors that any Federal questions ever appeared or were raised in the Courts below.

To said assignment of errors the present defendant pleaded [see Record, pp. 11-2, 13], said plea being *in nullo est erratum*, with a traverse as to some of the allegations, and also containing allegations of certain facts. See

ELIOT VS. MCCORMICK, 141 Mass. 194-5.

And the writ of errors was heard by a single Justice of said Supreme Court, who found certain facts, and reported the case to the full bench.

[Record, pp. 2-5.]

(a)

Facts found by the single Justice:

Some of the more important facts in connection with the present writ of error that were so found and reported were as follows:

That there was an attachment in the original suit, of goods, effects and credits of plaintiffs in error, by trustee process, in the hands of the trustees who were summoned;

That the writ was duly entered and declaration duly filed;

That there was no personal service on plaintiffs in error (originally defendants), but that there was a service by publication according to an order of the Court;

That defendants in the original suit (i. e., plaintiffs in error) appeared generally by duly authorized attorneys, one of whom tried the case for them;

That the amendments to the declaration were duly consented to by fully authorized counsel, and allowed;

That certain of the trustees were charged by order duly entered according to the established practice, and judgment for plaintiff (here defendant) duly entered.

[See Record, pp. 3-4.]

[The writ of error was heard by the full bench, and the judgment in the original case was affirmed, on May 15, 1900

(Record, pp. 63-6, 59).]

(3)

Questions presented in this Court:

The questions arising in the present case can of course only be Federal questions.

See WATER POWER CO. vs. ST. R. CO., 172 U. S. 475 [487-8.]

Such Federal questions are confined to those that are found in the present assignment of errors [Record, pp. 60-1], and can include *only* such of the latter as appear in the Record, and were raised in the Courts below, as is shown later in this brief.

As has already been stated, and will be shown, no Federal questions appear in the Record of the Courts below, or were anywhere raised, except in the assignment of errors in the Massachusetts Supreme Court [Record, pp. 8-10].

Such questions as are raised in the present assignment of errors, and which also appear to have raised in some form under the writ of error in the Massachusetts Supreme Court, are, principally:

1. Whether the plaintiffs in error have been deprived of their property without due process of law, because it is *alleged*

[without foundation, however, as we show] that there was no valid and effectual attachment, no service on plaintiffs in error by publication or otherwise, and no voluntary appearance by them in the Superior Court.

[See Record, p. 8, 60-1.]

2. The question is proposed, as a Federal question, that the "*judgment*" would "impair the obligation of contracts." [Record, pp. 61, 10.]

3. That full faith and credit were not given to the judicial proceedings of the Supreme Court of the State of New York. [Record, pp. 61, 10.]

4. It is also further attempted to question the validity of certain chapters of the Mass. Public Statutes, [See Record, p. 61.] as impairing the obligation of contracts and depriving plaintiffs in error of their property without due process of law.

POINTS AND AUTHORITIES.

I.

All Federal questions raised below were raised, not in the Superior Court, but in the Supreme Court of Massachusetts on the writ of error brought in said Supreme Court, and appear in the assignment of errors there filed.

(1)

That no Federal questions were ever raised in the case in the Superior Court, or on the exceptions taken to the Supreme Court of Massachusetts, will be clear from an inspection of the Record :

a. See the original pleadings. [Record, pp. 16-8, 21-3.] The answer was merely a general denial [Record, p. 22], and no Federal question was raised.

b. See the exceptions taken by plaintiffs in error (there the defendants). All these exceptions but one were confined merely to objections to the admission of evidence, said exceptions being:

(1) As to the admissibility of the testimony of Lillian Dietz, employed by McKeon, in regard to the value of the goods in question, to which testimony plaintiffs in error objected on the ground she was not qualified to give her opinion as to value [Record, p. 33];

(2) As to the admissibility of the testimony of the present defendant in error as to the fair value of the accounts on McKeon's books against his customers [Record, p. 34];

(3) As to the admissibility in evidence of affidavits of Simon Rothschild and B. F. Einstein and Frank Rothschild, Jr. [Record, pp. 34, 37, 46];

(4) As to the admissibility of testimony of present defendant in error regarding a conversation in New York between himself and Frank Rothschild, Jr., the general agent of plaintiffs in error, wherein he stated that Rothschild offered him the dividend which would come to plaintiffs in error, if their claim was proved in the Massachusetts Insolvency Court, if he would drop the suit in the Superior Court [Record, p. 49];

(5) As to request of present plaintiffs in error, when all the evidence was in, that the Court would rule "that there was no evidence to warrant the finding that McKeon intended to prefer them (there the defendants), or intended to prevent the property from coming into the possession of the assignee, or from being distributed according to the laws relating to insolvency, and that the action could not be maintained." [Record, p. 53.]

In all these exceptions, no Federal questions were raised, or intended to be raised, as is evident from an inspection of them. Only exceptions (1) and (3) [above] were argued. [See c. below.]

c. See the opinion of the Supreme Court in passing upon the exceptions. [Record, pp. 62-3.]

Only the exceptions relating to the testimony of the witness Dietz, and the admissibility of the affidavits were argued [See (1) and (3) above], as is stated by the Court.

Exceptions (2), (4) and (5) (above) were therefore waived.

IASIGI VS. SHEA, 148 Mass. 539.
COM. VS. MCCUE, 121 Mass. 358 (360).

Here, also, there is no trace of any Federal question.

In the said assignment of errors are to be found *the only Federal questions* which appear by the Record ever to have arisen in the courts below.

We now proceed to discuss, below, in detail, the Federal questions attempted to be raised in the case.

II.

The first assignment of error is as follows: —

"1. *That in said suit there was drawn in question the validity of an authority exercised under said State of Massachusetts as being repugnant to Article* 1 *of the fourteenth amendment to the Constitution of the United States, which was specially set up and claimed, in that these defendants were deprived of their property without due process of law, and the decision was in favor of the validity of the authority drawn in question.*" (Record, p. 60-1.)

(1)

No such authority was drawn in question as alleged.

The authority exercised by the highest court of the State of Massachusetts in hearing and determining the case in question *is not the kind of authority which is referred to* in Section 709 of the Revised Statutes, which provides in what cases a writ of error will lie from this Court to a State Court.

No other authority exercised under the State of Massachusetts can possibly be referred to, and no Federal question, therefore, is raised by said assignment of error.

U. S. REVISED STATUTES, Sect. 709.
SNOW VS. U. S., 118 U. S. 346 (353-4).
BETHELL VS. DEMARET, 10 Wall. 537 (540).

Otherwise every judgment of the highest court of a State would be re-examinable under said section of the Revised Statutes.

BETHELL VS. DEMARET (supra).

(2)

Plaintiffs in error were not deprived "without due process of law."

The above assignment of error is vague and indefinite as to why there was not "due process of law." According to the wording of the assignment of error we are confined to points raised in the Court below; nor would this Court examine here any Federal questions not arising there.

CITIZENS SAV. BK. VS. OWENSBORO, 173 U. S. 636 (643) [and cases cited].

The only Federal questions appearing in the Record as raised in the Court below, as pointed out under I. above, are found in the assignment of errors in the Supreme Court of Massachusetts. Further, the allegation is that the matter was "specially set up and claimed," and there is no other place in the Record but said assignment of errors where anything specially set up and claimed or drawn in question is found relating to a Federal question. [See Record, pp. 8-10.]

The only alleged grounds there appearing for the contention that in said suit an authority was exercised "*without due process of law*," are the allegations—

(A) that there was no valid attachment;
(B) that there was no service, personally or by publication, upon plaintiffs in error (there the defendants); and
(C) that they did not voluntarily appear before the Superior Court;
(D) that the declaration was objectionable.

See Record, p. 8 (assignments of error Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11).

A.

There was an attachment in due form by trustee process of debts due the plaintiffs in error (the original defendants) from debtors residing in the Commonwealth of Massachusetts.

This was found as a fact, in the proceedings under the writ of error in the Massachusetts Supreme Court, in the hearing before a single Justice of the Supreme Judicial Court of Massachusetts, before the writ of error was heard by the full bench, as shown by his report.

[Record, p. 3, and see Record, p. 64.]

This Court will go no further, but is concluded by this finding. W. U. Tel. Co v C. P. Co. 181 U.S. 92. (103-4)
EGAN VS. HART, 165 U. S. 188 (189)
[and cases cited].

If it were necessary to go further, the Record shows the fact of this attachment:

[See Record, pp. 14, 15, 16, 18, 19.]

Such an attachment gave jurisdiction to the Superior Court to render judgment.

Record, pp. 64-5 (Opinion of the Mass. Supreme Court).
s. c., ROTHSCHILD VS. KNIGHT, 176 Mass. 48 (53-5).
FREEMAN VS. ALDERSON, 119 U. S. 185 (187-8).
KING VS. CROSS, 175 U. S. 396 (399).
CHICAGO, R. I. &C. RY. VS. STURM, 174 U. S. 710 (714-6).
ELIOT VS. MCCORMICK, 144 Mass. 10 (11-2).

And it made no difference that the attachment was *by trustee process.*

KING VS. CROSS (supra).
CHICAGO, R. I. &C. RAILWAY VS. STURM (supra).
COOPER VS. REYNOLDS, 10 Wall. 308 (317).
OCEAN INS. CO. VS. PORTSMOUTH M. R. CO., 3 Met. 420 (422-3).
FOLGER VS. COL. INS. CO., 99 Mass. 267 (272-3).
Story on Conflict of Laws (7th ed.) Section 592, a.

B.

There was no personal service upon plaintiffs in error (the original defendants), but there was a service by means of notice by publication ordered by the Court, and it was duly given as ordered.

This was found as a fact by the single Justice of the Supreme Court, who heard the case under the writ of error before it was heard by the full bench, as shown by his report.

[Record, p. 3.]

This Court will not inquire further.

W. U. Tel. Co. v. C. P. Co. 181 U. S. 92, (103-4)

EGAN vs. HART, 165 U. S. 188 (189)
[and cases cited].

If it were necessary to go further, see Record, pp. 19-21, and p. 58.

C.

There was a general voluntary appearance of the plaintiffs in error (the original defendants) by duly authorized attorneys, in the usual way, and they made answer, and contested the case at all stages until judgment was rendered.

This was found as a fact by the single Justice of the Supreme Court of Massachusetts, who heard the case under the writ of error before it was heard by the full bench, as shown by his report.

[Record, pp. 3-4]

and see Record, p. 65. [Opinion of the Supreme Court.]
s. c., ROTHSCHILD vs. KNIGHT, 176 Mass. 48 (53).

This Court will not inquire further.

EGAN vs. HART, 165 U. S. 188 (189).

If necessary to go further, the Record shows this.

Record, pp. 56, 21, 22, 24, 26.
Record, pp. 25-53 (bill of exceptions).

Such an appearance gave jurisdiction to the Superior Court, without reference to service.

Record p. 65 (Opinion Mass. Supreme Court).
s. c., ROTHSCHILD vs. KNIGHT, 176 Mass. 48 (53-5).

See Massachusetts Public Statutes, Chap. 167, Sect. 82, which is as follows:

"Sect. 82. A judgment shall not be arrested for a cause existing before the verdict, unless such cause affects the jurisdiction of the court. And *when the defendant has appeared and answered to the merits of the action, no defect in the writ or other process by which he has been brought before the court, or in the service thereof, shall be deemed to affect the jurisdiction of the court.*"

See

FREEMAN vs. ALDERSON, 119 U. S. 185 (188).
PENNOYER vs. NEFF, 95 U. S. 714, 723, 731, 733.
GROVER & BAKER M. Co. vs. RADCLIFFE, 137 U. S. 287 (298).
COOPER vs. REYNOLDS, 10 Wall. 308 (317-8).
WRIGHT vs. ANDREWS, 130 Mass. 149.
LOOMIS vs. WADHAMS, 8 Gray, 557 (561).
ELIOT vs. MCCORMICK, 144 Mass. 10 (11).
GILMAN vs. GILMAN, 126 Mass. 26.
HAZARD vs. MASON, 152 Mass. 268 (270-1).
GLEASON vs. DODD, Admr. 4 Met. 333 (342).
PIERCE vs. EQUIT. LIFE INS. CO., 145 Mass. 56 (57).

In order to show that they were not voluntarily before the Superior Court, it would have been necessary for the plaintiffs in error to show that they *limited the authority* of the attorney who appeared for them, or instructed him to appear *specially*.

WRIGHT vs. ANDREWS (supra).

The facts found by the single Justice of the Supreme Court, however, show the opposite, as above pointed out.

So the rest of the record shows, also.

(See above.)

D.

Any questions regarding the *sufficiency of the declaration* which may be found raised in the Court below in the assignment of errors in the Massachusetts Supreme Court [Record, pp. 8-9], if, indeed, they can be considered at all in connection with the query whether there was "due process of law," are sufficiently answered by referring to the opinion of the Massachusetts Supreme Court.

[Record, p. 65.]

S. C., ROTHSCHILD VS. KNIGHT, 176 Mass. 48 (55-6).

It is there held that the judgment is well supported by the declaration, and that the amendments of the latter were properly allowed, as found by the single Justice. [Record, pp. 3-4.]

All three of the counts (see statement of the case above) had for their object the recovery, by the original plaintiff as assignee in insolvency, of the value of the same lot of goods, to wit, those described in the schedule annexed to the first count, which were fraudulently conveyed or delivered to the original defendants by McKeon, the insolvent debtor. And although count one was not in detail as full as counts two and three, its *import or gist* was plainly the *same*; and all three counts were consistent, as the Supreme Court found. [Record p. 65.]

It is believed that misjoinder of counts, if it existed, presents no Federal question.

McDONALD v. MASS., 180 U. S. 311 (313)
and see G (below).

Though hardly necessary, perhaps, here to allude to the point, it is clear that there was no joinder or misjoinder of counts *in contract* with counts *in tort*, but the declaration contained three counts all of the same import, and all in tort, and it was,

therefore, quite proper that *a general verdict* should be given, since the plaintiffs in error did not move to have defendant in error (there the plaintiff) *elect* under *which* count he would proceed.

MAY VS. WESTERN UNION TEL. CO., 112 Mass. 90 (93).
RICHMOND VS. WHITTLESEY, 2 Allen 230 (234-5).

It would have, even then, been discretional with the Court as to whether plaintiff should elect between the counts or not.

TEAGUE VS. IRWIN, 134 Mass. 303 (307).

[An action of tort is a suitable form of action to recover under those statutes under which the action was brought.

TAPLEY VS. FORBES, 2 Allen, 20 (24).]

Nor, if there *had* been a joinder of counts in *contract* with counts *in tort* in the declaration, would it have amounted to a waiver of the right to such an action. [See Record, p. 10, assignment No. 15.]

CRAFTS VS. BELDEN, 99 Mass. 535 (539).
MORSE VS. HUTCHINS, 102 Mass. 439.
TEAGUE VS. IRWIN, 134 Mass. 303 (307).
MAHON VS. BLAKE, 125 Mass. 477 (480).

E.

The question as to whether or not the writ was entered late [Record, p. 10, No. 14] cannot arise in this connection on the question whether there was "due process of law," for it was waived or abandoned in the Court below by plaintiffs in error at the hearing, as stated by the single Justice in his report. [Report, Record, p. 2.]

The Record does *not* show, in fact, that there was any late entry of the writ. On the contrary the single Justice found as a fact that it was *duly entered*. [Record, p. 3.]

F.

Any questions relating to a "*penalty*" being involved, which were set forth in the assignment of errors below [See Record, p. 9, Nos. 10 and 11], whatever they may be, are not raised in the present assignment of errors [Record, pp. 60-1].

No *penalty* was in fact involved. The action was not for the recovery of a *penalty*, but to recover the value of goods conveyed in fraud of the laws relating to insolvency.

Mass. Public Statutes, Ch. 157, Sects. 96 and 98 (cited above in statement of the case).
(Such a statute was valid; see BROWN VS. SMART, cited below under III and IV.)
Record, p. 65 [Opinion of the Mass. Supreme Ct.]
S. C., ROTHSCHILD VS. KNIGHT, 176 Mass. 48 (56).

It might properly be begun by trustee process.

Mass. Pub. Statutes, Chap. 183, Sec. 1:

"SECTION 1. All personal actions, except actions of replevin and actions of tort for malicious prosecution, for slander either by writing or speaking, and for assault and battery, may be commenced by trustee process. * * * "

G.

This Court will not consider any questions of procedure with relation to the question whether there was or was not "due process of law." The opinion of the Massachusetts Supreme Court will be taken as conclusive on these points.

L. ID. WATER SUPPLY CO. VS. BROOKLYN, 166 U. S. 685 (688.)
LOEBER VS. SCHROEDER, 149 U. S. 580 (585.)

H.

For the above reasons it can hardly be held that plaintiffs in error have been deprived of their property "without due process of law," and also because it appears, in the present case, that they had a full and fair trial in the Superior Court of Massachusetts, and in the Supreme Court on exceptions, and afterwards again in the Supreme Court of Massachusetts on writ of error.

See

CENTRAL LAND CO. VS. LAIDLEY, 159 U. S. 103 (112.)
DAVIDSON VS. NEW ORLEANS, 96 U. S. 97 (105).
KENNARD VS. LOUISIANA, 92 U. S. 480 (481, 483).

III.

The second assignment of error is as follows: —

"2. *That in said suit there was drawn in question the validity of an authority exercised under said State of Massachusetts as being repugnant to Article* 1, *Section* 10, *of the Constitution of the United States, which was specially set up and claimed, and the decision was in favor of the validity of the authority drawn in question.*" [Record, p. 61.]

(1)

No such authority was drawn in question as alleged.

It may here be stated, as above under II. (1), that the authority exercised by the highest Court of the State of Massachusetts in hearing and determining the case in question, is *not the kind of authority which is referred to* in Section 709 of the Revised Statutes, which provides in what cases a writ of error will lie from this Court to a state Court.

No other authority exercised under the State of Massachusetts can possibly be here referred to, and no Federal question is therefore raised by this assignment of error.

U. S. Revised Statutes, Sect. 709.
SNOW VS. U. S. 118 U. S. 346 (353-4).
BETHELL VS. DEMARET, 10 Wall. 537 (540).

Otherwise every judgment of the highest Court of a State would be re-examinable under said section of the Revised Statutes.

BETHELL VS. DEMARET (supra).

(2)

Nor was any Federal question raised below as to any authority exercised repugnant to Article 1, *Section* 10, *of the Constitution.*

As shown under I. above, no Federal questions below appear, nor are "specially set up and claimed," except in the assignment of errors in the Massachusetts Supreme Court, and to these we are confined here. (See II. (2) above.)

[See Record, pp. 8-10.]

Upon examination, we find no question in the said assignment of errors which can involve the question set up in the above second assigned error, except the assertion contained in No. 16, stating that "*the judgment if allowed to stand, will impair the obligation of contracts.*"

[Record, p. 10 (No. 16).]

The provision is found in Article 1, Section 10, of the Constitution, that "no State shall . . . pass any . . *law impairing the obligations of contracts.*"

U. S. Constitution, Article 1, Sect. 10.

The only question raised by said assignment of error is, therefore, that "*the judgment*" will impair the obligation of contracts, as shown above.

There is no question here raised at all about the State of Massachusetts passing any "*law*" impairing the obligation of contracts; it was only insisted that the "*judgment*" would do so. This raises no Federal question at all. This Court will not review a "*judgment*" of the highest Court of a State because it might impair the obligation of contract.

MORLEY VS. LAKE SHORE R. Co., 146 U. S. 162 (171, bottom),

and see

ARROWSMITH VS. HARMONING, 118 U. S. 194 (195-6).
N. O. WATERWORKS VS. LA. SUGAR CO., 125 U. S. 18 (30).

Moreover, what contracts are referred to by the assignment of error is not stated, but is left entirely indefinite.

The contract should appear in the Record, if there *is any contract*, the impairment of the obligation of which could be questioned under the assignment of error.

RED RIVER CATTLE CO. VS. SULLY, 144 U. S. 209.
N. ORLEANS VS. N. O. WATERWORKS CO., 142 U. S. 79 (88).
ST. PAUL GAS LT. CO. *vs.* ST. PAUL, 181 U. S. 142 (147).

It is believed that this assignment of error needs no further discussion, for the reasons stated above. But we proceed, nevertheless, in order to make our argument complete. No question as to the statutes having been brought to the Court's attention below, its decision could hardly be said to necessarily involve them; but we discuss them below.

A.

There were no pre-existing contracts to be impaired by the insolvency statute; and they must have been pre-existing, or else the provision as to impairment of obligation does not apply.

It does not appear that the original contract of plaintiffs in error with McKeon, nor any other contract alluded to in the Record, as, for instance, that of the trustees (summoned by the original trustee process) with plaintiffs in error, or any contract with McKeon (see statement of the case), *was in existence when the insolvency laws of Massachusetts were passed*, and the burden would be on planitiffs in error to show this.

Since none of the contracts alluded to in the Record, even had they been sufficiently set forth, were shown to have been in existence when the insolvency laws were passed, therefore the question whether the obligation of any of such contracts was thereby impaired is not before this Court, as it is not a Federal question.

BROWN VS. SMART, 145 U. S. 454 (457-8).
DENNY VS. BENNETT, 128 U. S. 489 (494-5).
LEHIGH WATER CO. VS. EASTON, 121 U. S. 388 (392).
R. CO. VS. MCCLURE, 10 Wall. 511 (515).

It may be mentioned that Sections 96 and 98 of Chap. 157 of the Massachusetts Public Statutes, before alluded to as being those concerning preferences, and under which the original action was brought, are the same as Sections 89 and 91 of Chap. 118 of the General Statutes of Massachusetts which were in existence in A. D., 1860.

Massachusetts could pass an insolvent law, provided it did not "impair *the obligation of existing contracts*."

BROWN VS. SMART (supra, p. 457, 458).
CENTRAL LAND CO. VS. LAIDLEY, 159 U. S. 103 (111.)
DENNY VS. BENNETT (supra, p. 497).

B.

No obligation of contracts was impaired.

Also for the following reasons it is submitted that of *no contracts* alluded to in the Record was the obligation impaired by the judgment, nor by the insolvent laws (assuming the latter could be here considered).

By the "obligation of a contract" is meant, in the Constitution, *the means which, at the time of its creation, the law affords for its enforcement.*

NELSON VS. ST. MARTIN'S PARISH, 111 U. S. 716 (720).
Constitution of the U. S., Art. I, Sect. 10.

Taking this definition, it is clear that there has been no impairment of the obligation of any contract set forth in the Record.

The law authorizing an attachment of the credits in the hands of the trustees merely took away from plaintiffs in error the right to receive such credits, if jurisdiction were obtained over said plaintiff in error and a judgment recovered against them, the same as any attachment and judgment would do; it did not make any change in the "*means*" *afforded by law* for plaintiffs in error to enforce their contract with the trustees, and the same is true of any contract with McKeon.

C.

Nor does it appear that any contracts ante-dated the trustee process statutes.

Nor does it appear that the Massachusetts Statutes regarding trustee process were passed *subsequently* to any contract alluded to in the Record. And unless such contracts existed *previously* to such statutes, the latter could not be questioned as impairing the validity of the obligations of such contracts. The burden was on plaintiffs in error to show such pre-existence, if there was such. See A (above).

D.

And it was proper to attach credits due non-residents.

There was no objection to the trustee process, because under it were attached credits due non-residents, to wit, plaintiffs in error.

KING vs. CROSS, 175 U. S. 396 (399) [supra].
CHICAGO, R. I. &C. R. vs. STURM, 174 U. S. 710 (714-6) [supra].
ROTHSCHILD vs. KNIGHT, 176 Mass. 48 (53-5) [supra]. (s. c., Record, pp. 64-5).
See II, (2), A (above).

E.

The provisions of the Massachusetts insolvent law were valid. If we ought to pursue this discussion further, it is believed and respectfully submitted that plaintiffs in error must be strictly confined to Federal questions raised below,

and that under this rule, and also for the reasons above shown, they cannot, under this second assignment of error, discuss the validity of any part of the insolvency laws of Massachusetts. See II (2) (above).

If, however, they could do so, they could question only the Sections 96 and 98 of Chap. 157 of the Mass. Public Statutes, regarding *preferences*, which are cited in full in the "statement of the case" (above) in this brief, and under which the original action was brought.

And a sufficient answer to such a challenge of the validity of these sections of the statute is that "each State has full authority to pass insolvent laws binding persons and property within its jurisdiction, provided it does not impair the obligation of existing contracts";

BROWN VS. SMART, 145 U. S. 454 (457).

See A (above) and cases cited.

and "a provision of the insolvent law of a State, that all conveyances by way of preference, of any property within its borders, made by a citizen of the State, being insolvent, and within four months before the commencement of proceedings in insolvency, shall be void, is a usual and a valid exercise of the power of the State over property within its jurisdiction, as to all such conveyances made after the passage of the law, whether to its own citizens or to citizens of other States."

BROWN VS. SMART, 145 U. S. 454 (458).

[Of course the same would be true, where it was similarly provided with regard to conveyances made within *six* months before commencement of insolvency proceedings, as in the present case.]

From this it follows, also, that the provision in said statute providing for a recovery of the value of the goods conveyed in preference to the non-resident plaintiffs in error, by means of an action against them, was proper, and the suit would be effective when jurisdiction was obtained over them, as in the original suit here in question.

We do not contend that the insolvency law of Massachusetts could *discharge* McKeon from his original contract with plaintiffs in error *unless they became parties to the insolvency proceedings.*

BROWN VS. SMART (supra, p. 457).

Nor does this question of discharge come up in this case, since there is here no appeal or writ of error from the insolvency proceedings in McKeon's case.

Nor does it appear that McKeon's original contract with plaintiffs in error was made and to be performed in New York, even if his usual course had been to send them checks in payment, though it is immaterial.

But the property conveyed by McKeon to plaintiffs in error December 20, 1895, was then within the jurisdiction of the State of Massachusetts and the scope of its insolvency law, and the conveyance was made within the State.

Nor were the trustees summoned in the original suit released from their obligation to pay the amount of their debts owed the plaintiffs in error, but these credits were attached by the trustee process, by the defendants in the original suit, as it has been held may properly be done against a non-resident defendant. See D (above).

This of course substituted the defendant for plaintiffs in error as those entitled to receive the money owed, as in every case where trustee process is brought.

[See cases under II, (2), A, as to trustee process.]

And that defendant had there a good right of action by a valid statute of Massachusetts is shown above.

BROWN VS. SMART (supra).
See A (above) and cases cited.

IV.

The third assignment of error questions the validity of Chapter 157 *of the Public Statutes of Massachusetts, stating that such validity "was drawn in question" in said suit "as being repugnant to Article* I, *Section* 10, *of the Constitution."*

[See Record, p. 61.]

[Chapter 157 is the Insolvency Statute of Massachusetts.]

It is believed that the Record does not show that any statute of Massachusetts was drawn in question, either in the Superior Court or in the Supreme Court of Massachusetts.

No statute or chapter of the Statutes of Massachusetts is mentioned in the assignment of errors in the writ of error in the Supreme Court of Massachusetts, as being questioned with reference to validity.

[See Record, pp. 8-10.]

There is only (a) a reference to "an attempt to obtain jurisdiction over these non-resident plaintiffs in error by *trusteeing* a debt due them;" (see Record, p. 8, No. 2.)

(b) a statement that the declaration in the original suit involved a penalty "*under the laws of this Commonwealth*," and another reference to the "attempt to obtain jurisdiction" "*by the trustee process.*" (See Record, p. 9, No. 11.)

These meagre allusions to the "trustee process" and the "laws of this Commonwealth" cannot justify plaintiffs in error in discussing Chapter 157 of the Public Statutes of Massachusetts before this Court, especially since even in these references there does not appear to be any question of the validity of the Statutes of the Commonwealth in general, or of the trustee process, or any *mention of the Insolvency Statutes.*

It is believed that the third assignment is an attempt to introduce into the Record Federal questions not lawfully found therein.

See CITIZENS SAV. BANK vs. OWENSBORO, 173 U. S. 636 (643).

In order to be considered here, any Federal question should have been presented to the State Court, or in some way have been called to its attention; it must have been raised and must appear in the Record, and have been decided, or the decision thereof have been necessarily involved in the decision of the case.

E. BUILDING &C. A. vs. WELLING, 181 U. S. 47 (49).
and cases cited.
WATER POWER CO. vs. ST. R. CO., 172 U. S 475 (488).
CITIZENS SAV. BANK vs. OWENSBORO, 173 U. S. 636 (643).
CHAPIN vs. FYE, 179 U. S. 126 (129-130).

The question has been already dealt with above under III.

(A)

The insolvency statute under which the suit was brought was valid; no "obligation of contracts" was impaired or could here be claimed to be impaired.

If, however, it is necessary to answer the challenge of the validity of the insolvent law, we are confined to the assertion that it is repugnant to Article I, Section 10, of the Constitution, which can only mean that it is a law passed by the State of Massachusetts impairing the "obligation of contracts."

U. S. Constitution, Article I, Sect. 10.

For the answer to this we respectfully refer to the argument under III (E, and B and A) (above). It is there shown:

(a) that the provisions of the insolvency law under which the original suit was brought are valid, according to decision in

BROWN VS. SMART, 145 U. S. 454 (458);
and other cases cited.

(b) that no "obligation of contract," according to the true meaning of the phrase, was impaired with reference to any contract alluded to in the Record, citing

NELSON VS. ST. MARTIN'S PARISH, 111 U. S. 716 (720).

(c) that the contracts the obligation whereof the obligation is claimed to be impaired under the said clause of the Constitution must be *pre-existing* contracts, and the plaintiffs in error do not show that any contracts even alluded to in the Record were in existence previous to the Insolvency Statute; citing

BROWN VS. SMART, (supra), (p. 457–8).
CENTRAL LAND CO. VS. LAIDLEY, 159 U. S. 103 (111).
and other cases cited.

It was also shown that any contract so asserted to be impaired, ought to be set forth in the Record, which is not the case here, citing

RED RIVER CATTLE CO. VS. SULLY, 144 U. S. 209.
N. O. VS. N. O. WATER WORKS CO. 142 U. S. 79 (88-9).
(See III, and cases cited.)

(B)

No question can here be raised about any other provisions of the insolvency law relating to proof of claims, or other proceedings in the insolvency court, as they are not involved in this case.

If they could be here properly discussed, the above cited decision in *Brown vs. Smart* (supra) is decisive as showing that the insolvency law prohibiting proof of claims by a preferred creditor is valid and binding.

V.

The fourth assignment of error asserts that the validity of Chapters 164 *and* 183 *of the Massachusetts Public Statutes was "drawn in question" "in said suit" as repugnant to Article I of the fourteenth amendment to the Constitution, as depriving the "non-resident plaintiffs in error of their property without due process of law."*

[Record, p. 61.]

Chap. 164 is as to *proceedings against absent defendants.*
Chap. 183 is in regard *to the trustee process.*

These statutes were not mentioned at all, or questioned as to their validity, in the Superior or Supreme Court of Massachusetts. No reference to them is found in the assignment of errors in the Supreme Court. [See Record, pp. 8–10.]

It is believed that the validity of these statutes cannot be questioned here, because it involves a new Federal question, and the same objections exist as with regard to the consideration of the insolvency statute, which are stated under IV (above), to which reference is asked.

(A.)

If, however, it is necessary here to answer the challenge of the validity of these statutes, we reply that it is shown under II that there *was a valid attachment* by trustee process, that the defendants (the present plaintiffs in error) voluntarily *appeared generally by fully authorized counsel* and contested the suit, and that these and other considerations as set forth under II show conclusively that there *was* "due process of law," and remove any need of further examination of the chapters above mentioned of the Public Statutes of Massachusetts.

We ask leave to refer to the argument and authorities under II (above).

It is there shown that the trustee process could properly be employed to attach debts due non-residents.

It is there shown that the general voluntary appearance of plaintiffs in error gave jurisdiction, even without reference to *service* upon them, and it is unnecessary to consider the provisions of Chap. 164 as to service any further.

See II (above).

(1.)

No penalty involved.

If any answer were needed, under this assignment of error to the statement asserted below that a "penalty" was involved by the suit in question, it is believed that a sufficient answer has already been given under II, above referred to.

Further, the action in question was not for the recovery of a "*penalty*," but to recover the value of goods conveyed in fraud of the laws relating to insolvency.

Record, p. 65 (Opinion of the Mass. Supreme Ct.)
s. c., ROTHSCHILD vs. KNIGHT, Assignee, 176 Mass. 48 (56).

It is believed that this Court will follow the above adjudication of the Massachusetts Supreme Court that no penalty was involved in the suit under said statute.

KNIGHT vs. U. S. LAND ASSOC'N. 142 U. S. 155 (160).

And, besides, it has already been shown by the decision of this Court in *Brown vs. Smart* (supra) that the section of the insolvency law making void the preference to a non-resident, was valid and proper, and the action provided for the recovery by the assignee of the value of goods conveyed by way of preference to the plaintiffs in error, was a reasonable and logical corollary thereto.

See III, E (above).

The argument, under II, that there was "due process of law," under the attachment by trustee process, with the general appearance of plaintiffs in error, we again refer to, though it is perhaps hardly necessary, to complete our answer to the matter of "penalty."

VI.

The fifth and last assignment of error asserts that "full faith and credit" was not given "to the judicial proceedings of the Supreme Court of the State of New York," as required by Article IV, *Section* 1, *of the Constitution.*

[See Record, pp. 61 and 10 (No. 17).]

(1)

No judicial proceedings were in evidence.

It does not appear that any judgment or judicial proceedings of a court in the State of New York were put in evidence, and the only suit in that State even mentioned in the Record was not a suit to which the present defendant was a party.

Record, p. 66 (Opinion of Mass. Supreme Court).
s. c., ROTHSCHILD vs. KNIGHT, Assignee, 176 Mass. 48 (56).

The plaintiff in the original suit (here the defendant) merely introduced copies of certain affidavits taken in the suit in New York, wherein plaintiffs in error sued McKeon, and attached the goods he had conveyed to them, as soon as said goods reached New York. (See statement of facts in the original case.)

See affidavits of S. Rothschild (Rec. p. 35).
affidavit of F. Rothschild, Jr. (Rec. pp. 46-8).
affidavit of B. F. Einstein (Rec. pp. 36-7).

These affidavits were introduced as admissions tending to show facts material *to the then plaintiff's case*, and also as contradicting certain testimony of witnesses of defendants (the present plaintiffs in error).

[See Record, p. 63 (Opinion of Mass. Supreme Court)],

but they were not the record of any *judgment*, or judicial proceedings, of a New York Court.

There was some testimony in the Record (see p. 45) that after the said goods were conveyed into New York and attached as aforesaid, by plaintiffs in error, and then replevied and sold at a sheriff's sale, and plaintiffs in error bought them all

(See statement of facts in original case) (above);

but this was not evidence of any *judgment*, or judicial proceeding, of a New York Court. Nor does it appear whether McKeon appeared in the suits, or whether there was any trial or judgment. Nor does the Record anywhere show what was subsequently done in said suit, or what judicial proceedings there were in it.

Even if there was testimony to be found in the Record (as there is not) with regard to any judicial proceedings in New York, it would not be sufficient to force a Massachusetts Court to give faith and credit to such proceedings *unless proved in the manner prescribed by Congress* in obedience to the Constitution.

For the Constitution provides in the same section that Congress may, "by general laws, prescribe the manner in which such * * * proceedings shall be proved, and the effect thereof."

Constitution of the U. S., Art. IV, Sect. 1.

And Congress has provided that such judicial proceedings "shall be proved, or admitted in any other Court within the United States, by the attestation of the clerk, and the seal of the Court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that

the said attestation is in due form. And the said records and judicial proceedings, *so authenticated*, shall have such faith and credit given to them in every Court within the United States as they have by law or usage in the Courts of the State from which they are taken."

U. S. Revised Statutes, Section 905.

In the above statute the method of proof of foreign judicial proceedings is prescribed. *Unless so proved*, no state would be bound to give faith and credit to the judicial proceedings of another state.

But here the Record discloses no proof of this kind (*or, indeed, any other*) as having been given of *any* judicial proceedings of the Courts of New York.

Hence there could have been no failure to give full faith and credit, as erroneously alleged in said assignment of error.

Moreover, had there been evidence in due form, namely, that any New York judicial proceedings existed which constituted a defense for plaintiffs in error (there defendants) in said case, it would, even if such judicial proceedings were shown, *in all cases* have been necessary to show that such proceedings took place in a court having jurisdiction of the cases and the parties, in order to make them entitled to full faith and credit here.

GROVER & BAKER M. CO. VS. RADCLIFFE, 137 U. S. 288 (294).
GILMAN VS. GILMAN, 126 Mass. 26 (27).
SEWALL VS. SEWALL, 122 Mass. 156 (161).
FOLGER VS. COL. INS. CO., 99 Mass. 267 (273).
CARLETON VS. BICKFORD, 13 Gray, 591 (593-4).

Even if properly proved, it would *not have been enough* for plaintiffs in error to show that there was an attachment, then a replevin, and a sheriff's sale in New York (if that is what the assignment of error refers to).

The sheriff's sale might have been previous to a judgment, as of perishable goods. We cannot assume a judgment from it, and the Record goes no further.

A.

The New York judicial proceedings, if proved, would have been immaterial.

But even if there *had* been proved a judgment against McKeon in the New York suit brought against him by plaintiffs in error, in which they attached the goods in question, and subsequently a replevin suit in which they bought them at a sheriff's sale, it is respectfully submitted that it would have no weight in this case, or anything to do with it.

Of course the Massachusetts insolvent law could not discharge McKeon from his contract with plaintiffs in error unless they appeared and submitted to the proceedings in the Massachusetts insolvency court. But, as shown by the decision in *Brown vs. Smart*, so often previously cited in this brief, the Massachusetts insolvent law as to making preferences void and giving a right of action to the assignee to recover the value of goods conveyed as a preference to a non-resident, *was valid*.

BROWN VS. SMART (supra).

See III, E, (above).

The assignee could enforce his remedy by a suit, *provided* jurisdiction could be obtained over the preferred non-resident, as was done in the present case.

The judgment or judicial proceedings in the suit against McKeon in New York, if they existed, could have nothing to do with this case, and could not have availed the plaintiffs in error as a defense, even had such judicial proceedings been proved. They were absolutely immaterial.

This writ of error should, therefore, be dismissed.

Respectfully submitted,

CHARLES M. RICE,
ROBERT A. KNIGHT,
for Defendant.

Supreme Court of the United States.

No. 108.—October Term, 1901.

Simon Rothschild and Frank Rothschild, Co-partners, doing business under the firm name and style of S. Rothschild & Bro., Plaintiffs in Error,
vs.
Robert A. Knight, Assignee in Insolvency of James McKeon.

In error to the Superior Court of the State of Massachusetts.

[March 3, 1902.]

James McKeon was a retail merchant in Springfield, Massachusetts, and became indebted to plaintiffs in error in the sum of about $4,000.

The indebtedness being overdue, Frank J. Rothschild, Jr., son of one of the plaintiffs in error, went to Springfield with full power to collect the debt. When there, he received from McKeon a quantity of fur garments, part of McKeon's stock. The garments had not been purchased of plaintiffs in error, and when they were received by Rothschild, Jr., for plaintiffs in error he knew McKeon was insolvent.

The furs were sent to the railroad station in trunks, checked and taken to New York as the personal baggage of Rothschild, Jr. A receipted bill or list of the goods was delivered by McKeon to Rothschild, Jr. Subsequently, however, in New York it was testified that McKeon "tore from the bill the receipt and wrote on the bill the word abbreviation 'Memo.' to indicate that the goods were on memorandum or consignment, and the defendant said that he would write to his bookkeeper that night and have the entry in his books made to conform with the bill by writing in the word 'Memo.'"

This was done by the advice of the attorney of plaintiffs in error, and so stated by him in an affidavit filed in an action brought by plaintiffs in error in the Supreme Court of the city and county of New York against McKeon.

The advice was given, the attorney deposed, in order to make the transaction appear what it was stated in his presence to be; that is, for security only, and not for the sale of the goods; and he advised a suit by plaintiffs in error against McKeon and an attachment of the goods. The suit was subsequently brought and the goods attached.

On the 20th December, 1895, McKeon was adjudged an insolvent in Massachusetts, and the defendant in error was appointed his assignee, and as such he brought this action by trustee process in the superior court for Hampden County, Massachusetts, for the value of goods conveyed by Mc-

Keon to plaintiffs in error, on the ground that the conveyance was made in fraud of the insolvency laws of Massachusetts. The officer's return on the writ showed service on the trustees, but none on the plaintiffs in error.

The writ was duly entered on the first Monday in May, 1896, and a declaration for goods sold and delivered by McKeon to the plaintiffs in error was duly filed. Subsequently upon its being brought to the notice of the court that plaintiffs in error were not inhabitants of the Commonwealth of Massachusetts, notice was ordered to be given to them by publication, and that the action be continued until such notice should be given. The notice was returnable on the first Monday in September, 1896, and was given as ordered, but no return or proof of it was made until July 6, 1899. On the 16th of September, 1896, plaintiffs in error (defendants in the action) appeared generally by their attorney, Charles C. Spillman, Esq., thereto duly authorized. On October 12, following, defendant in error (plaintiff) moved to amend his declaration, to which counsel for plaintiffs in error consented, and it was allowed. Plaintiffs in error filed an answer denying each and every allegation in the original and amended declaration. On June 21, 1897, the defendant in error again amended his declaration with the consent of E. N. Hill, Esq., who was then acting as counsel for plaintiffs in error, having been retained generally by plaintiffs in error, though his written appearance was not entered until June 26. By virtue of his general authority he could consent to the allowance of amendments. He conducted the case for plaintiffs in error.

The amendment added two counts to the declaration, charging the conveyance to plaintiffs in error by McKeon as having been made to prevent the property from coming to his assignee in insolvency, in fraud of the laws of the State relating to insolvent debtors.

The jury rendered a verdict against the plaintiffs in error for the sum of $6,420, and they moved for a new trial by their attorney, E. N. Hill. On the 31st of July, 1897, plaintiffs in error "alleged sundry exceptions to the opinions and rulings of the court, which, being found conformable to the truth, were allowed and signed by the presiding judge, and the questions were transmitted to the Supreme Judicial Court for consideration."

The bill of exceptions contained the evidence, and concluded as follows:

"Upon this evidence the defendants asked the court to rule that there was no evidence to warrant the finding that McKeon intended to prefer the defendants or intended to prevent this property from coming into the possession of the assignee or from being distributed according to the laws relating to insolvency, and that the action could not be maintained. The court refused so to rule and the defendants duly excepted.

"And the defendants being aggrieved by these rulings and refusals to rule, and having excepted thereto, after verdict against them, pray that their exceptions and their exceptions to the admission of testimony as hereinbefore stated, be allowed."

On the 15th of February, 1898, the motion for a new trial was denied, and on the 28th of February, 1899, a rescript was received from the Supreme Judicial Court overruling the exceptions of plaintiffs in error.

On the 6th of March, 1899, judgment was entered against plaintiffs in error "for the sum of seven thousand and seventy-one dollars and sixty-three cents, damages, and costs of suit, taxed at ninety-one dollars and seven cents, and that execution therefor issue against the goods, effects and credits of the said defendants in the hands and possession of the said trustees, Smith & Murray and Houston & Henderson, who were by the court adjudged to be trustees" of plaintiffs in error.

On May 12, 1898, plaintiffs in error filed an assignment of errors under the State practice as follows:

"1. That the record discloses that there was no valid and effectual attachment of the goods, estate or effects of the plaintiffs in error upon the writ, which is the necessary foundation of the jurisdiction of said Superior Court to support any proceeding against an unserved, absent defendant.

"2. That the record discloses that the action was an attempt to obtain jurisdiction over these non-resident plaintiffs in error by means of trusteeing a debt due them, and said attempt was an infringement of the rights of the plaintiffs in error as guaranteed by the Constitution of the United States.

"3. That the record discloses that neither the plaintiffs in error nor either of them were voluntarily before said Superior Court, and the record fails to show any service upon them, either personally or by publication, as ordered by said court.

"4. That the record discloses that the judgment, if allowed to stand, will deprive these plaintiffs in error of their property, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

* * * * * *

"10. That the record discloses that the various amendments to the declaration of the defendants in error converted the action into one for the recovery of a penalty, and that such attempt is an infringment of the rights, privileges and immunities of the plaintiffs in error, guaranteed by the Fourteenth Amendment to the Constitution of the United States.

"11. That the record discloses that there were counts in the declaration of the defendants in error, which under the laws of this Commonwealth involved a penalty, and that a judgment on said counts would be conclusive on these plaintiffs in error as to their liability therefor, and would, without further trial, subject their rights to such penalty, and that such attempt to obtain jurisdiction over the persons or property of these plaintiffs in error, by the trustee process served on a debtor in this State for the purpose of fixing upon them a liability for such penalty is contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States."

The assignments of error were subsequently amended by adding the following:

"16. That the record discloses that the judgment, if allowed to stand, will impair the obligation of contracts, contrary to the Constitution of the United States.

"17. That the record discloses that the Superior Court did not give full faith and credit to the judicial proceedings of the courts of New York, as required by the Constitution of the United States."

On the 17th of June, 1898, the defendant in error filed his plea and traverse. A hearing was subsequently had before a single justice to establish the plea and traverse, who, a doubt being suggested as to his authority to dispose of the case, after finding the facts, reported the case to the full court. The case was heard by the Supreme Court, and on May 15, 1900, a rescript was sent to the Superior Court affirming the judgment. (176 Mass. 48.) This writ of error was then sued out and allowed by the Chief Justice of the Superior Court.

Mr. Justice McKENNA delivered the opinion of the Court.

A motion is made to dismiss the writ of error upon the ground that no Federal question was raised in the Superior Court. Federal questions were raised, however, on writ of error to the Supreme Court, and that we think, was a sufficient claim. (*Myer* v. *Richmond*, 172 U. S. 82; *Arowsmith* v. *Harmoning*, 118 U. S. 194; *Sully* v. *American National Bank*, 178 U. S. 289.)

The objection that the writ of error should have been directed to the Supreme Court and not to the Superior Court is answered by *McDonald* v. *Massachusetts*, (180 U. S. 311.)

The constitutional questions raised by plaintiffs in error are (1) that they have been deprived of their property without due process of law; (2) that if the judgment be allowed to stand it will impair the obligation of contracts, contrary to the Constitution of the United States; (3) that full faith and credit was not given to certain judicial proceedings had in the Supreme Court of the State of New York.

(1) (2) These grounds may be considered together. To sustain them plaintiffs in error assert the invalidity of certain public statutes of Massachusetts, viz., chapter 164, relating to absent defendants; chapter 183, relating to the trustee process; and chapter 157, relating to insolvency.

The sections in regard to insolvency are inserted in the margin.*

* The sections of the insolvency laws of Massachusetts, under which the action was originally brought in the Superior Court of Massachusetts, are sections 96 and 98 of Chapter 157 of the Massachusetts Public Statutes, and are as follows:

"SEC. 96. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the petition by or against him, with a view to give a preference to a creditor or person who has a claim against him, or is under any liability for him, procures any part of his property to be attached, sequestered or

The provisions relating to trustee process are as follows:

"SEC. 21. When a person who is summoned as trustee has goods, effects or credits of the defendant intrusted or deposited in his hands or possession, such goods, effects and credits shall be hereby attached and held to respond to the final judgment in the suit, in like manner as goods or estate attached by the ordinary process, except as hereinbefore provided."

"SEC. 25. Any money or other thing due to the defendant may be attached, as herein mentioned, before it has become payable, if it is due absolutely and without any contingency; but the trustee shall not be compelled to pay or deliver it before the time appointed by the contract."

It is difficult to state the argument made to support the contention of plaintiffs in error. It rests ultimately on a claim of immunity from suit in Massachusetts and a claim of immunity from attachment of debts due plaintiffs in error from citizens of Massachusetts. Argumentatively, it is said that the action originally brought did not justify trustee process, and that the amendments subsequently made to the declaration were not authorized, though consented to by counsel who appeared in and conducted the case. We do not assent to either proposition.

To what actions the remedy of attachment may be given is for the legislature of a State to determine and its courts to decide, and the power of counsel certainly extends to consenting to amendments authorized by the laws of the State. Indeed, it would be novel to hold that the court could not have granted the amendments, even against the opposition of counsel, without violating the Constitution of the United States. And the

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seized on execution, or makes any payment, pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, having reasonable cause to believe such person is insolvent or in contemplation of insolvency, and that such payment, pledge, assignment or conveyance is made in fraud of the laws relating to insolvency, the same shall be void; and the assignee may recover the property or the value of it from the person so receiving it or so to be benefited."

"SEC. 98. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the petition by or against him, makes a sale, assignment, transfer or other conveyance of any description, of any part of his property to a person who then has reasonable cause to believe him to be insolvent or in contemplation of insolvency, and that such sale, assignment, transfer or other conveyance is made with a view to prevent the property from coming to his assignee in insolvency, or to prevent the same from being distributed under the laws relating to insolvency, or to defeat the object of, or in any way to impair, hinder, impede or delay the operation and effect of, or to evade any of said provisions, the sale, assignment, transfer or conveyance shall be void, and the assignee may recover the property or the value thereof as assets of the insolvency. And if such sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be *prima facie* evidence of such cause of belief."

contention that the debts due to plaintiffs in error by certain citizens in Massachusetts were not subject to attachment in that State because their situs was in New York, cannot be maintained. We decided adversely to the proposition in *Chicago, R. I. & C. R. R.* v. *Strum,* (174 U. S. 710.) That case was followed and applied in *King* v. *Cross,* (175 U. S. 396,) and we are satisfied with the reasoning of both cases.

But it is urged that the transaction between McKeon and the agent of the plaintiffs in error did not constitute a debt, but was in the nature of an offense to which a penalty was incident, and to the commission of the offense an intent was necessary, and that the intent of the agent of plaintiffs in error could not be ascribed to them. The Supreme Court of the State, however, decided that "the action is not for recovery of a penalty, but to recover the value of goods conveyed in fraud of the laws relating to insolvency, and it properly might be commenced by trustee process. (Pub. Sts. c. 157, §§ 96, 97; c. 185, § 1.)"

We need only add that the law would be of little value if its prohibition did not apply to non-resident creditors, whether acting directly or through an agent. That the conveyance to plaintiffs in error was made to give a fraudulent preference must necessarily have been found as a fact by the jury, and such finding we accept.

(3) No record was introduced in evidence of the judicial proceedings to which, it is claimed, faith and credit were not given. The only evidence in regard to the proceedings consisted of the affidavit already referred to, and an affidavit of like import made by S. Rothschild, one of the plaintiffs in error. The affidavits were introduced by defendants in error. On behalf of plaintiffs in error Frank J. Rothschild testified as follows: "These goods (meaning the goods received from McKeon) were attached by Simon Rothschild & Bro., and were sold by order of the sheriff. We bought them, that is, Simon Rothschild & Bro. bought them, at the sheriff's sale."

Assuming, but not deciding, that such evidence was sufficient, and that a record properly authenticated was not necessary to give the plaintiffs in error the benefit of the constitution and statutory provisions, the proceedings, notwithstanding, did not constitute a defense to the action. The preference given by McKeon to plaintiffs in error was consummated in Massachusetts. Therefore the proceedings had in New York were immaterial.

Finding no error in the record, judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.